83-371

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Government in the Sunshine Act, 5 U.S.C. 552b, which generally requires that agency meetings be open to public observation, applies when members of an administrative agency who do not constitute a quorum and have not been authorized to conduct official business on the agency's behalf participate in informal, general discussions with their foreign counterparts concerning issues of common interest.

2. Whether suit may be brought in district court to enjoin allegedly *ultra vires* action by the Federal Communications Commission even though jurisdiction to review that agency's orders is vested exclusively in the court of appeals and the precise issue raised in the district court suit could have been reviewed by this method.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the United States is a petitioner, and Southern Pacific Communications Company and RCA Global Communications, Inc., are respondents.

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The Solicitor General, on behalf of the Federal Communications Commission and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-54a) is reported at 699 F.2d 1219. The opinion of the district court (App. D, *infra*, 60a-66a) is not reported. The opinion of the Federal Communications Commission (App. E, *infra*, 70a-87a) is reported at 77 FCC 2d 877.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 55a-56a) was entered on February 1, 1983, and a timely petition for rehearing was denied on April 6, 1983 (*id.* at 57a-58a). By order dated July 1, 1983, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 3, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 402(a) of the Communications Act, 47 U.S.C. 402(a), provides:

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

28 U.S.C. 2342 provides in pertinent part:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47; * * *.

The Government in the Sunshine Act, 5 U.S.C. 552b, provides in pertinent part:

> (a) For purposes of this section—
>
> (1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;
>
> (2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business * * *.
>
> * * * * *
>
> (b) Members shall not jointly conduct or dispose of agency business other than in accordance with

this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

STATEMENT

1.a. In 1976, Congress enacted the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241, 5 U.S.C. 552b, which requires that any "meeting" of an "agency" covered by the Act must be open to public observation except in a few, specific circumstances. The term "agency" is narrowly defined (5 U.S.C. 552b(a)(1)) to include only those agencies

> headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

The term "meeting" is defined (5 U.S.C. 552b(a)(2)) as:

> the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business * * *.

If a covered "agency" holds a "meeting" as defined in the Act, in most circumstances, the time, place, and subject matter of the meeting must be announced at least one week in advance. 5 U.S.C. 552b(e)(1). The meeting also must be open to the public unless one of the Act's ten exceptions applies (see 5 U.S.C. 552b(c)).[1]

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[1] Most of these exceptions mirror those in the Freedom of Information Act, 5 U.S.C. 552. However, the Sunshine Act has no analog to Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), which protects, *inter alia*, the internal deliberations of a government agency. And, unlike the FOIA, the Sunshine Act contains an exception for meetings at which a person is accused of a crime or is censured (5 U.S.C. 552b(c)(5)), as well as exceptions protecting against the premature disclosure of certain information from agencies that regulate currency, securities, commodities, or financial institutions (5 U.S.C. 552b(c)(9)(A)); premature disclosure of information that is likely significantly to frustrate im-

If the agency wishes to invoke one of those exceptions, it may do so only by a formal vote (5 U.S.C. 552b (d)(1)). In addition, the agency must make and maintain a complete transcript or recording of the meeting[2] and must permit public inspection of all portions of the transcript or recording not protected by the exemption under which the meeting was closed (5 U.S.C. 552b(f)).

"[A]ny person" may seek judicial review of an agency's compliance with the open-meeting requirement by filing suit "in the district court * * * for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia" (5 U.S.C. 552b(h)(1)). If the court finds that the agency has failed to satisfy the Act, it "may grant such equitable relief as it deems appropriate," including disclosure of the transcript or recording of the meeting (5 U.S.C. 552b(h)(1)).[3]

b. The Communications Act, 47 U.S.C. 151 *et seq.*, confers upon the Federal Communications Commission the power to regulate "interstate and foreign commerce in communication by wire and radio * * *" (47 U.S.C. 151). As part of this mission, the Commission regulates the operations of respondent and the other companies involved in this case, which are existing or proposed common carriers of "record" communications (*i.e.*, written communications, such as telex) in the international market. A common carrier may acquire facilities so as

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plementation of a proposed agency action (5 U.S.C. 552b(c)(9)(B)); and discussions regarding a particular adjudication or a pending court case (5 U.S.C. 552b(c)(10)).

[2] If a meeting is closed under Exemption 8 (examination, operating and condition reports by agency that regulates financial institutions) or Exemption 9 (see note 1, *supra*), the agency may at its option prepare a set of detailed minutes rather than a full transcript or recording. 5 U.S.C. 552b(f)(1).

[3] However, no court "having jurisdiction solely on the basis of [the Act is authorized] to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information * * *) taken or discussed at any agency meeting out of which the violation * * * arose." 5 U.S.C. 552b(h)(2).

to initiate new service only after it obtains from the Commission a certificate of "public convenience and necessity" (47 U.S.C. 214). As a practical matter, however, if the proposed new service is to be international, the carrier may not begin operations until it reaches agreement with the appropriate government agencies in the foreign countries it proposes to serve. See *ITT World Communications, Inc.* v. *FCC*, 595 F.2d 897 (2d Cir. 1979).

c. Under FCC regulations, "[a]ny interested person may petition for the issuance, amendment or repeal of a rule or regulation." 47 C.F.R. 1.401(a). The petition "shall set forth * * * all facts, views, arguments and data deemed to support the action requested * * *" (47 C.F.R. 1.401(c)). The Commission then issues a "public notice" of the petition (47 C.F.R. 1.403), and "[a]ny interested person may file a statement in support of or in opposition to" it (47 C.F.R. 1.405(a)). The Commission's rules also permit aggrieved parties to petition for a declaratory ruling regarding the propriety of Commission actions, including those not theretofore embodied in orders subject to judicial review (47 C.F.R. 1.2).

Jurisdiction to review Commission orders, including declaratory rulings and orders denying petitions for rulemaking is vested exclusively in the courts of appeals. The relevant provision of the Communications Act provides (47 U.S.C. 402(a)):[4]

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

Chapter 158 of Title 28, in turn, provides at 28 U.S.C. 2342:

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[4] Section 402(b) permits an appeal to the United States Court of Appeals for the District of Columbia Circuit in cases involving certain types of orders, such as the denial of a license or construction permit.

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47 * * *.

2.a. Respondent ITT World Communications, Inc. is an existing international record carrier in the trans-Atlantic market. In 1977, the FCC authorized two smaller companies, Graphnet Systems, Inc. and GTE Telenet Communications Corp., to enter into competition with respondent in this field. Respondent unsuccessfully challenged those authorizations in a petition for review filed in the Second Circuit. See *ITT World Communications, Inc.* v. *FCC*, 595 F.2d 897 (1979).

Despite the Commission's authorizations, the European telecommunications agencies, with which respondent has been doing business for years, refused to enter into interconnection arrangements with the new companies, and those companies were consequently unable to begin competing with respondent.[5] See App. A, *infra*, 4a. Between October 1979 and October 1980, at conferences in Europe, three of the seven members of the Commission held informal discussions touching upon this situation with officials of the European and Canadian agencies.

These discussions took place at a series of conferences among telecommunications administrators called the "Consultative Process" (CP) (see App. E, *infra*, 78a). Begun in 1974, the CP was orginally intended "to improve, through the exchange of information and views, the usage planning of jointly-owned telecommunications facilities in the North Atlantic Region" (*ibid.*). ITT actively supported the CP until the Commissioners attending a session in Dublin, Ireland, in October 1979

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[5] In recent years, these companies have obtained operating agreements with some foreign countries. They now offer limited service in competition with respondent.

initiated a preliminary discussion concerning the desirability of adding to the agenda topics such as new carriers and services (*ibid.*). "Out of apparent concern that such additional consultations could ultimately lead to greater competition in the provision of international communications services," respondent launched a two-pronged attack that "in effect challenge[d] the Commission's authority to engage in any form of foreign consultative discourse" (*id.* at 78-79a).

b. First, in October 1979, respondent petitioned the Commission for rulemaking. Respondent requested that the Commission issue a policy statement disclaiming any intent to negotiate with foreign telecommunications agencies and delineating the authority of Commissioners attending CP sessions (App. E, *infra*, 71a-72a). Respondent also sought the issuance of rules requiring that the Commission provide 30 days' advance public notice of all such meetings and the topics to be discussed and that any interested carrier be permitted to object to the scheduled topics to propose additional topics, and to express its views (*id.* at 72a). Under respondent's proposal, the Commission would have been required to indicate its disposition of all such comments received (*ibid.*) Furthermore, respondent sought the promulgation of regulations requiring that all such international consultations be open to the public in compliance "with the spirit and the letter" of the Sunshine Act; that all discussions be held on the record; and that all interested private parties be permitted to express their views (*id.* at 72a).[6]

The Commission denied respondent's rulemaking petition. The Commission stated that it had never negotiated with foreign telecommunications officials and that those officials had manifested understanding of the scope of the Commission's authority (App. E, *infra*, 79a-80a). The Commission observed that the Consultative Proc-

[6] Respondent also charged that the CP meetings constituted *ex parte* proceedings and thereby violated respondent's right to due process. See App. E, *infra*, 73a.

ess did not involve negotiation but had provided "a valuable if not indispensable source of information" concerning "future foreign communications needs and the solutions to those needs that will be acceptable to other countries" (*id.* at 79a). The Commission stated that the discussions thereby "free[d] [the Commission] from near total dependence on [its] regulatees in gauging foreign telecommunications problems and needs" (*ibid.*). By the same token, the Commission noted that the discussions gave the attending Commissioners the opportunity "to explain and promote [the FCC's] statutory mandate" to foreign officials accustomed to legal and economic systems far different from ours (see *id.* at 81a-82a). The Commission concluded (*id.* at 81a) that the Communications Act, which confers upon the Commission the authority to regulate international communications, "clearly permits—in fact encourages"—the informal contacts challenged by respondent.

In addition, the Commission held (App. E, *infra*, 81a-84a) that the Sunshine Act does not apply to the CP sessions. However, "recogniz[ing] and support[ing] the desirability of conducting its activities, both formal and informal, within public view," the Commission adopted notice and reporting requirements with respect to contacts with foreign administrators (*id.* at 84a).

c. While its rulemaking petition was still pending (see App. A, *infra*, 12a), respondent filed suit against the Commission in the United States District Court for the District of Columbia, claiming among other things that the Commissioners were acting *ultra vires* by engaging in negotiations at the CP sessions and that they were violating the Sunshine Act (see App. D, *infra*, 61a-63a). The district court dismissed the *ultra vires* count for lack of standing and ripeness[7] and expressed

[7] The district court construed respondent's *ultra vires* claim as based on the Logan Act, 18 U.S.C. 953, which makes it a crime for unauthorized persons to negotiate with foreign governments, and held that only the State Department has standing to complain of the violation of that statute (App. D, *infra*, 63a). The court also concluded that the *ultra vires* claim would

doubt about its subject matter jurisdiction over that claim (*ibid.*; App. C, *infra*, 59a). The court also granted ITT's summary judgment motion on the Sunshine Act claim (*id.* at App. D, *infra*, 65a-66a; App. C, *infra*, 59a).[8]

d. Consolidating ITT's petition for review of the denial of rulemaking with cross-appeals from the district court judgment, the court of appeals held that the *ultra vires* count had been improperly dismissed and that the Sunshine Act applies to the CP sessions (App. A, *infra*, 13a-21a, 34a-45a). The court also reversed in part the FCC's denial of rulemaking (*id.* at 45a-53a).

The court of appeals concluded that the district court had subject matter jurisdiction over the *ultra vires* count because, in the court of appeals' view, that claim presented different issues from the rulemaking petition, de novo judicial factfinding was needed, and the allegedly improper Commission action would not otherwise be subject to judicial review (App. A, *infra*, 13a-17a).

Turning to the interpretation of the Sunshine Act, the court of appeals first considered the provision making the Act applicable only at gatherings attended by a quorum of the full agency or a subdivision authorized to act on its behalf (5 U.S.C. 552b(a)(1)). The court noted that the attending Commissioners constituted a quorum of one of the Commission's two standing committees, the Telecommunications Committee. While acknowledging that the limited authority delegated to the Telecommunications Committee by the FCC rules did not authorize it to act on the Commission's behalf at the CP

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not be ripe until the two new carriers were accepted by the foreign entities, at which time respondent could "object through the formal rulemaking process" (*ibid.*).

[8] Respondent also sought disclosure under the Freedom of Information Act of certain documents related to the CP meetings. See App. E, *infra*, 71a n.1. The district court ordered disclosure of the documents (App. D, *infra*, 63a-65a), but the court of appeals reversed as to all but two of them (App. A, *infra*, 21a-34a). The government does not seek review of the court of appeals' decision with respect to those two documents.

sessions, the court inferred that such authority had been granted informally and in contravention of the Communications Act (App. A, *infra*, 36a-37a). The court did not decide whether the CP sessions constituted "deliberations," one of the key elements needed for Sunshine Act coverage (see 5 U.S.C. 552b(a)(2)) (see App. A, *infra*, 37a). Finally, the court held (*id.* at 38a-40a) that the CP sessions resulted in the conduct of "official agency business" within the meaning of the Act (5 U.S.C. 552b(a)(2)) because, in the court's view, important matters related to agency business were discussed and because the court saw no relevant distinction between those discussions and "hearings [and] meetings with the public," which, according to the court's reading of the legislative history, were intended to fall within the statutory coverage (App. A, *infra*, 38-39a).

The court of appeals also reversed the denial of rulemaking on the Sunshine Act issue (App. A, *infra*, 48a), remanded the Commission's refusal to delineate its authority at the CP sessions for failure to compile an adequate administrative record (*id.* at 49a-53a), and "direct[ed] that, so long as the [Telecommunications] Committee continues to play [the same] role in the consultative process, it do so only pursuant to a proper and precise delegation of authority from the Commission" (*id.* at 53a). To prevent "duplication, conflicting resolutions, and further delay" because of its double remand to the Commission and the district court, the court of appeals suggested that the Commission stay further action on the rulemaking petition until the district court disposes of the *ultra vires* claim (*id.* at 52a).

The Commission's petition for rehearing was denied, with Judges MacKinnon, Bork, and Scalia voting for rehearing en banc.

REASONS FOR GRANTING THE PETITION

The court of appeals has issued two important rulings that threaten significant interference with the proper and efficient functioning of administrative agencies.

The court has held that the Sunshine Act applies to informal exchanges, overseas, by agency delegates with their foreign counterparts, even though the delegates have no authority to act for the agency. And the court has held that persons challenging agency action may bypass normal statutory review procedures by filing suit in district court alleging that the agency has acted *ultra vires*.

These rulings are plainly wrong and will produce deleterious consequences. Because all suits under the Sunshine Act (see 5 U.S.C. 552b(h)(1)) and the vast majority of suits alleging *ultra vires* action by administrative agencies (see 28 U.S.C. 1391(e)) may be brought in the United States District Court for the District of Columbia, review by this Court is warranted at the present time.

1. a. The Sunshine Act requires (5 U.S.C. 552b(b)) that "every portion of every meeting of an agency shall be open to public observation" unless it falls within one of the Act's exceptions (see 5 U.S.C. 552b(c)). As previously noted, the term "agency" is limited to a "collegial" body or "any subdivision thereof authorized to act on behalf of the agency" (5 U.S.C. 552b(a)(1)). The term "meeting" is defined as the "deliberations" of a quorum of the agency or an authorized subdivision "where such deliberations determine or result in the joint conduct or disposition of official agency business" (5 U.S.C. 552b(a)(2)). Thus, the Sunshine Act applies only if (i) a quorum of an agency or "subdivision thereof authorized to act on behalf of the agency" (ii) engages in "deliberations" (iii) that "determine or result in the joint conduct or disposition of official agency business." None of these elements is satisfied here.

b. i. The CP sessions were not attended by a quorum of the Commission or any authorized subdivision. It is undisputed that a quorum of the Commission—then four members[9]—was not present. The court of appeals

[9] 47 U.S.C. 154(h). Effective July 1, 1983, the size of the Commission was reduced from seven to five members, and a

held, however, that the Act applied because a quorum of the three-person Telecommunications Committee (see 47 C.F.R. 0.215)—one of the Commission's two standing committees (47 C.F.R. 0.4)—was in attendance. That holding, however, will not withstand analysis.

First, the Commission's rules plainly show that the Telecommunications Committee was not authorized to act on the Commission's behalf at the CP sessions. Pursuant to the Communications Act (47 U.S.C. 155(b)), the Commission has delegated specific, limited functions to the Telecommunications Committee (47 C.F.R. 0.215), *i.e.*, the authority to act upon applications by common carriers for certificates of public convenience and necessity (47 U.S.C. 214) and certain applications for radio station construction permits (47 U.S.C. 319). It has never been suggested that the Telecommunications Committee members engaged in either of these activities at the CP gatherings. Accordingly, they were not "authorized to act on behalf of the [Commission]" at those gatherings, and if they had purported to do so, their actions would have been of no effect.

Nevertheless, the court of appeals inferred that the Commission had made an unofficial and, indeed, an unlawful delegation of authority to its Telecommunications Committee,[10] and the court held that such a dele-

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quorum was therefore reduced from four to three. Pub. L. No. 97-253, title V, sec. 501(b), 96 Stat. 805 (1982).

[10] The court of appeals concluded (App. A, *infra*, 36a-37a; footnotes omitted) that unofficial authorization had been granted because

> (1) Committee members attend CP exchanges in their "official roles"; (2) their goal is to build a "consensus" that will "lead ultimately to operating agreements for ITT's competitors" and (3) they convey the information and views "exchanged" at the meetings to the full Commission for its consideration.

However, similar factors will likely be present whenever representatives of an administrative agency attend an international or other conference. They are almost certain to attend in their official capacities; the conference undoubtedly will have some objective related to the agency's functions; and the representa-

gation suffices to activate the Sunshine Act's requirements (App. A, *infra*, 36a-37a, 52a-53a).

Not only was there no basis for the court of appeals factfinding, but the court completely disregarded the normal presumption of administrative regularity. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971); *United States* v. *Chemical Foundation, Inc.* 272 U.S. 1, 14-15 (1926). The court reasoned (App. A, *infra*, 36a) that "applicability of the Sunshine Act manifestly cannot turn on whether an agency has in fact followed proper procedures for delegating authority to a subdivision, for the requirements of the Act could otherwise be evaded at will." Whatever attraction the court's interpretation may have at first blush, it is inconsistent with the language of the Act and will in practice prove to be unworkable.

The language of the Sunshine Act shows that an agency "subdivision" is not "authorized to act on behalf of the agency" unless it has received an official delegation of authority. The very term "subdivision" connotes a body that has been officially created and that has a fixed membership and responsibilities, rather than a loose group informally assigned by an agency to assist it in the performance of certain tasks. The requirement that a quorum of the subdivision must be present also suggests that the subdivision must have a fixed, ascertainable membership, for otherwise it would be impossible to determine whether a quorum is in attendance. As a leading treatise on the Sunshine Act states (R. Berg & S. Klitzman, *An Interpretive Guide to the Government in the Sunshine Act* 3 (1978)): "At a minimum, a subdivision must have a specified membership and fixed responsibilities; an informal working group authorized to report back to the body is not a subdivision."

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tives will probably report back to their colleagues. Thus, if the factors upon which the court of appeals relied are sufficient to show unofficial authorization and to overcome the force of regulations withholding official authorization, the presumption of administrative regularity will be eviscerated.

The quorum requirement also suggests that the subdivision must possess the authority to take formal action on behalf of the agency rather than merely the responsibility to assist the full agency in some way. The latter function may be performed whether or not a quorum of a subdivision is present. Thus, if Congress intended the Act to cover bodies possessing only such informal power, it is difficult to understand why it included the quorum requirement. On the other hand, a quorum is needed in order for the subdivision to take formal action, and therefore the quorum requirement makes perfect sense if, as we maintain, the Sunshine Act reaches only those agency subdivisions possessing officially delegated powers.

Practical considerations also suggest that Congress intended this interpretation. If the Sunshine Act were satisfied by unofficial authorization or authorization in contravention of governing statutes or rules, as the court of appeals held, a colorable Sunshine Act claim could be asserted whenever agency members engaged in any activity related to their official responsibilities. In all such instances, it could be claimed that, despite proof that official authorization had not been granted or even had been expressly withheld, the members in fact received unofficial, implied, or sub rosa authorization to act on the agency's behalf. Persons asserting such claims would predictably demand the right to discover all information bearing upon the question of unofficial authorization. Such evidentiary proceedings obviously would create a great potential for harassment and interference with the proper functioning of the agency. Congress could not have wanted to encourage these results.

The court of appeals concluded that unofficial authorization satisfies the Sunshine Act because the court wished to prevent evasion of the Act's requirements (see App. A, *infra*, 36a). However, the court overlooked several factors that significantly limit the importance of this problem. If agency members purport to take official action on the agency's behalf without prop-

er authorization, their action may be set aside. On the other hand, if they do not purport to take such action but merely assist the full agency, any official action subsequently taken by the agency will be subject to the Sunshine Act's constraints. Moreover, an agency willing to delegate its authority in order to evade the Sunshine Act's requirements may easily do so by authorizing a single agency member[11] or agency employees[12] to act on its behalf. While Congress recognized such possibilities,[13] it chose not to make the Act's coverage absurdly broad solely to preclude all chance of evasion.

ii. The Sunshine Act applies only if an agency or authorized subdivision engages in "deliberations [that] result in the joint conduct or disposition of official agency business" (5 U.S.C. 552b(a)(2)). Although the court of appeals dealt at length with the problem of defining "the joint conduct or disposition of official agency business" (see App. A, *infra*, 37a-43a), the court dispensed altogether with the requirement that the agency or subdivision must engage in "deliberations." The court wrote (*id.* at 37a):

> "Deliberations" might be read narrowly to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency. On the other hand, "conduct ... of official agency business" suggests a much broader

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[11] The Act is limited to "joint" conduct. See 5 U.S.C. 552b(b) (emphasis added) ("[m]embers shall not *jointly* conduct or dispose of agency business other than in accordance with this section"); 5 U.S.C. 552b(a)(2) ("meeting" defined to include only "the *joint* conduct or disposition of agency business"). Thus the Act does not apply where only one agency member is present. S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975).

[12] Agency employees, even when authorized to act on behalf of the agency, are not covered because the Act applies only to "agency" meetings, and the term "agency" is defined as a collegial body appointed by the President with the advice and consent of the Senate or any subdivision of that body (5 U.S.C. 552b(a)(1)). See S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975).

[13] See S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975).

> range of activity, including, *inter alia*, hearings and meetings with outsiders.

The court then proceeded to examine the latter question (*id.* at 37a-43a), never to return to the requirement of "deliberations."[14] The court thus excised one of the Act's key elements.

The court of appeals' radical surgery greatly expanded the Act's coverage. The term "deliberations" is defined as "weighing and examining the reasons for and against a choice or measure" and as "discussion and consideration by a number of persons of the reasons for and against a measure." *Webster's Third New International Dictionary* 596 (1976); see also *Black's Law Dictionary* 384 (5th ed. 1970). Thus, as the court of appeals itself suggested (App. A, *infra*, 37a), the term excludes the gathering of information when not related to any pending or prospective agency decision, as well as efforts to explain the basis for or to facilitate compliance and cooperation with a decision that has already been completed.[15] By reading the element of "deliberations" out of the statute, the court was able to reach precisely the opposite result.

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[14] The court of appeals mentioned the term "deliberations" at one subsequent point in its opinion, stating (App. A, *infra*, 39a) that Commissioners participating in the CP sessions may "gather[] information and opinions" that may prove useful in some unidentified future FCC deliberations. But the mere fact that attendance at an event may furnish information that may be useful in future deliberations does not mean that the event itself involves "deliberations." Reading documents or inspecting facilities may furnish such information, but those activities can hardly be termed "deliberations."

[15] In another portion of its opinion, the court of appeals essentially acknowledged that the CP discussions were not "deliberations." Rejecting the argument that certain documents prepared by FCC staff members during those conferences were protected by the deliberative process privilege from disclosure under the FOIA (App. A, *infra*, 31a-34a), the court wrote (*id.* at 34a; footnotes omitted): "It is not enough for an agency to assert that factual material "may be used" in future deliberations; the agency must demonstrate that the material at issue is inextricably intertwined with a *specific* deliberative proceeding."

iii. The final element required for Sunshine Act coverage is that the deliberations must "result in the joint conduct or disposition of official agency business" (5 U.S.C. 552b(a)(2)). The legislative history indicates that this language, while extending beyond those sessions at which an agency formally disposes of a matter (S. Rep. No. 94-354, 94th Cong., 1st Sess. 18 (1975) (hereinafter "S. Rep."), does not include every gathering at which some reference is made to agency business.[16] The authoritative Senate report[17] (S. Rep. 18) states:

> To be a meeting the discussion must be of some substance. Brief references to agency business where the commission members do not give serious attention to the matter do not constitute a meeting. * * * The words "deliberation" and "conduct" were carefully chosen to indicate that some degree of formality is required before a gathering is considered a meeting for purposes of this section.

The same report goes on to indicate that "informal and preliminary discussions," as opposed to "discussions which effectively predetermine official actions," do not fall within the Act (*id.* at 19). Adopting this same limitation, R. Berg and H. Klitzman, *supra*, at 9 (emphasis added) concludes:

> A discussion which is sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably *firm positions regarding matters pending or likely to arise before the agency* is a meet-

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[16] Indeed, in an apparent effort to narrow the legislation's coverage, the Conference Committee amended the bill so that it would apply only when "deliberations *determine or result in* the joint conduct or disposition of agency business" (5 U.S.C. 552b(a)(2)); emphasis added) rather than when they merely "*concern* the joint conduct of agency business" S. 5, 94th Cong., 1st Sess., § 201(a) (1975).

[17] The Conference Report (H.R. Rep. No. 94-1441, S. Rep. No. 94-1178, 94th Cong., 2d Sess. 11 (1976)) adopted the Senate report's explanation of the term "meeting."

ing, while, in our view, a discussion which is *merely informational or exploratory* is not.

Under this interpretation, it seems clear that the CP sessions did not "result in the joint conduct or disposition of official agency business." The court of appeals did not identify any official FCC action that had been predetermined at those gatherings; nor did the court find that the discussions focused on any discrete proposal related to any matters pending or likely to arise before the agency. On the contrary, the court found that the CP sessions served two far different purposes. First, the court stated (App. A, *infra*, 38a-39a; emphasis added) that the meetings "are an important means *for gathering information and opinions* from foreign administrations" and that such information may prove useful in future, unidentified FCC deliberations. As previously noted, however, a discussion that is merely informational and that does not relate to any pending or prospective agency action falls outside the Act.

Second, the court of appeals found (App. A, *infra*, 39a) that the FCC had "chosen the CP as the vehicle to assist Graphnet and Telenet in obtaining interconnection agreements." However, accepting for the sake of argument the accuracy of the court's description of the CP sessions, such efforts on the part of the Commissioners in attendance did not predetermine or relate to any future FCC decision or any matter pending or likely to arise before the Commission, since the Commission had already authorized Graphnet and Telenet to enter the trans-Atlantic record communications market. Rather, the Commissioners merely sought to explain the basis for and thus facilitate implementation of a decision that had previously been made.

Disregarding the limitations clearly spelled out in the legislative history, the court of appeals adopted a sweeping interpretation of the phrase "conduct or disposition of official agency business." The court rejected "a distinction between an agency's *predecisional* activities and its *postdecisional* efforts to implement, interpret, and promote its policies" (App. A, *infra*, 39a);

found that merely "gathering information" may trigger the Act's coverage (*id.* at 38a-39a); and concluded that "informal background discussions" may also fall within the Act, particularly if "outside parties" are present (*id.* at 41a-43a). Apart from the suggestion that "chance meetings," "social gatherings," and informal conversations among agency members are usually not covered by the Act (see App. A, *infra*, 43a), the only easily discernible limitation in the court's definition is that covered sessions must entail discussion that is related to the agency's work in a way felt by the court to be important (see *id.* at 38a). This limitation obviously provides little guidance.[18]

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[18] The only authority cited by the court of appeals (see App. A, *infra*, 38a & n.154) for its sweeping interpretation is three isolated sentences in the House and Senate reports suggesting that public meetings and hearings are covered by the Act. See H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 7 (1976); S. Rep. 17, 18. The court then reasoned (*id.* at 39a-40a) that "hearings" and "meetings with the public" are indistinguishable from other discussions between agency members and outsiders.

The court of appeals "read too much into these scattered bits of legislative history." *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 20 (1981). There is a vast difference between agency "hearings," on the one hand, and discussions, like the CP sessions, between agency members and a small group of nonmembers, on the other. Hearings are usually formal, focus upon a particular proposal or problem—and are usually open to the public unless a sensitive subject is being discussed, in which case one of the Sunshine Act exceptions may apply. See, *e.g.*, 47 U.S.C. 154(j) (FCC hearings open to public upon request but may be closed to protect secret national defense information); see also 5 U.S.C. 552b(c)(1) (Sunshine Act exception for similar information). Discussions, by contrast, are frequently informal, wide-ranging, and exploratory; and privacy is often essential if they are to be useful.

The other proposition upon which the court of appeals relied—that "meetings with the public" must be open to the public—is merely a statement of the obvious (and is based upon a single sentence in the Senate report (S. Rep. 18)). Yet the court drew heavily upon this redundancy, and thus concluded that the Act proscribes virtually all informal, off-the-record discussions between an agency or subdivision quorum and outside parties. Consequently, a sentence in the Senate report that must have

c. The cumulative effect of the court of appeals' interpretation of the elements needed for Sunshine Act coverage gives the Act a startling reach far exceeding anything Congress intended. Under the court of appeals' approach, the Act would appear to apply whenever two or more agency members acting under what may be deemed unofficial agency authorization attend a gathering at which any matter viewed by the courts as related in some significant way to the agency's business is discussed. This interpretation of the Act—which regulates informal, general discussions far removed from any prospective official agency action—will unduly isolate agency members and thus hamper the effective performance of their responsibilities.

It may be that in a future case the court of appeals would draw back from the broad pronouncements in its opinion here. We would certainly urge it to do so. But there will be no opportunity for that court to rectify its decision unless agencies deliberately take actions that are arguably in violation of the broad pronouncements in the decision below. Since agency members are quite properly reluctant to engage in such conduct, the court of appeals' decision will have a harmful chilling effect as long as it remains in force.

The present case graphically illustrates the deleterious results that the court of appeals' construction will produce. Rapid technological advances have heightened the need for international coordination in many regulatory fields, including communications; and such coordination demands that administrators from different countries understand each other's objectives and strategies, as well as the technical, economic, legal, and political constraints under which they work. The best way to achieve the necessary mutual understanding is often through meetings at which administrators from different countries may meet face-to-face and engage in gen-

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seemed innocuous and self-evident to any congressman who read it is virtually the only reed supporting the court of appeals' far reaching interpretation of one of the Act's key provisions.

eral, wide-ranging, and informal discussions. If such meetings must be open to the public (5 U.S.C. 552b(b)), if there must be a formal agenda (5 U.S.C. 552b(e)(1)), and if discussions must be recorded or transcribed (5 U.S.C. 552b(f)(1)), then the utility of such gatherings will be greatly reduced. Indeed, it can be expected that foreign participants will frequently make clear—as happened here[19]—that they will not tolerate such peculiarly American restrictions, particularly upon meetings held on foreign soil. As a consequence, no discussions will be held or the American administrators will be effectively precluded from participation. This will not mean more government in the sunshine. It will mean more international misunderstanding and less effective regulatory coordination. No one will benefit—except regulatees like respondent, which will have found a new and ingenious way to thwart the administrative process.

2. Equally damaging to the administrative process is the court of appeals' holding (App. A, *infra*, 13a-16a) that respondent is entitled to sue the FCC in district court for the purpose of correcting allegedly *ultra vires* agency action. The court reached this conclusion even though exclusive jurisdiction to review FCC orders is vested in the courts of appeals, even though an issue virtually identical to respondent's *ultra vires* claim had been presented in respondent's rulemaking petition and was before the court of appeals in respondent's petition for review of the denial of rulemaking, and even though respondent, by a motion to the Commission for a declaratory ruling (47 C.F.R. 1.2), could have raised the *identical* issue embodied in its district court claim. The court of appeals' decision on this issue is a marked de-

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[19] No CP sessions have been held since the court of appeals' decision. Pursuant to an order of the court of appeals entered before this case was decided, the last CP session, held in Madrid, Spain, in October 1980, was taped, but the European participants objected strongly, and this gathering proved far less useful than its predecessors. (See Affadivit of Willard L. Demory (App. 1a-5a to FCC Br. in the court of appeals in Nos. 80-2324, 80-2401)).

parture from settled law. See 5 U.S.C. 704 (agency action is reviewable in district court under Administrative Procedure Act where "there is no other adequate remedy in a court").[20]

a. Initial review of FCC orders, like those of many other administrative agencies,[21] is committed exclusively to the courts of appeals, rather than the district courts. This procedure ensures that challenges to administrative action are presented to the agency prior to judicial review; it guarantees that administrative action will not be delayed or reversed by a single district court judge but may only be set aside by a panel of appellate judges; it provides for review by a court with far greater cumulative expertise concerning sometimes arcane administrative matters; it streamlines the administrative process by removing a layer of judicial review; it reinforces the rule that agency decisions should be reviewed on the administrative record, rather than based upon *de novo* judicial factfinding; it prevents interference with agency work and harassment of agency members and staff through time-consuming discovery requests and trial court proceedings; and it lessens the likelihood of conflicting adjudications concerning the same issue. See generally *Whitney National Bank* v.

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[20] The court of appeals' decision stands the proper review procedure on its head because, not only does it recognize concurrent district court jurisdiction, contrary to Congress' express command, but it grants this illegitimate form of review precedence over the statutorily-mandated procedure by suggesting that the Commission "stay[] further action on ITT's rulemaking petition pending the district court's resolution of the *ultra vires* issue" (App. A, *infra*, 51a-52a). Compare *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965) (the likelihood of "duplicative procedures" and "conflicting determinations" "militate[s] in favor of the conclusion that the statutory steps provided in the Act are exclusive").

[21] See *e.g.*, 15 U.S.C. 45(c) (Federal Trade Commission); 15 U.S.C. 77i, 78y, 79x (Securities and Exchange Commission); 21 U.S.C. 371(f) (Food and Drug Administration); 29 U.S.C. 160f (National Labor Relations Board). See also 3 K. Davis, *Administrative Law Treatise* § 23.03 at 302-306 (1958 & 1982 Supp.); L. Jaffe, *Judicial Control of Administrative Action* 157 (1965).

Bank of New Orleans, 379 U.S. 411, 419-423 (1965); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50 (1938); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv. L. Rev. 980, 983 (1975).

b. The court of appeals acknowledged that exclusive jurisdiction to review FCC orders is committed to the courts of appeals (App. A, *infra*, 13a), but the court found that concurrent district court jurisdiction was appropriate in this case for three reasons. None of those reasons, however, provides an adequate ground for permitting a regulatee such as respondent to bypass the prescribed method of judicial review.

First, the court of appeals observed that respondent's rulemaking petition and its *ultra vires* count were not identical. The court remarked (App. A, *infra*, 14a) that while the "petition asked the Commission for a declaration of the nature of its authority with respect to the CP meetings," the *ultra vires* claim "assert[ed] that the Commission, irrespective of what it acknowledges as the proper scope of its authority, has *in fact* secretly exceeded that authority and will not admit to having done so." In our view, there is no real difference between these two issues. The Commission certainly did not detect any such distinction. It stated (App. E, *infra*, 77a) that respondent's petition raised the issue "whether the Commission has engaged in 'negotiations.'" And the Commission concluded (*ibid.*) that it "ha[d] not 'negotiated' with foreign entities."

But even if there is a distinction between the issues raised in respondent's rulemaking petition and its district court complaint, that distinction is wholly the result of the way in which respondent chose to frame its pleadings. By couching its rulemaking petition in slightly different terms or by moving the Commission for a declaratory ruling (47 C.F.R. 1.2) concerning the legality of the Commissioners' conduct at the CP sessions, there is no doubt that respondent could have brought before the Commission *precisely* the same claim asserted in the *ultra vires* count. Any subsequent Com-

mission order would then have been reviewable only in the courts of appeals.[22] Respondent should not be allowed to circumvent the review procedures established by Congress solely because it artfully constructed a razor-thin distinction between the claims asserted in its administrative and district court pleadings.

The court of appeals' second reason for recognizing concurrent jurisdiction was the alleged inadequacy of the administrative record as a basis for evaluating respondent's *ultra vires* claim and the purported need for "the kind of independent, *de novo* factfinding appropriate in the district court" (App. A, *infra*, 15a; footnote omitted). But the court ignored the fact that any need for additional factfinding could easily have been met by remanding the case to the Commission for supplementation of the administrative record[23] or, if necessary, by referring the case to a district court judge as special master for proceedings in accordance with the court of appeals' specific guidelines and directions (see 28 U.S.C. 2347(b)(3)).

The court of appeals' final reason for allowing respondent's *ultra vires* claim to go forward was that the challenged FCC action would not otherwise be subject to judicial review (App. A, *infra*, 16a). As previously noted, however, review in the court of appeals was available in two ways: by a petition for review of the denial of respondent's rulemaking request or by petition for review of a declaratory ruling.

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[22] For cases involving court of appeals' review of FCC declaratory rulings, see *Chisholm* v. *FCC*, 538 F.2d 349, 364-365 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976); *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969).

[23] See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 594 (1980). This procedure has been followed even where, as here, the factfinding concerned alleged agency impropriety. See, *e.g.*, *PATCO* v. *FLRA*, 672 F.2d 109 (D.C. Cir. 1982); *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 58-59 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959). See also *Writers Guild of America, West, Inc.* v. *American Broadcasting Co., Inc.*, 609 F.2d 355, 363-364 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).

c. Even if the court of appeals' holding is limited to claims alleging unlawful agency action not embodied in an order subject to judicial review, its harmful potential is significant. Such claims are easy to imagine, and the decision below will encourage their assertion. By making burdensome and intrusive discovery requests, by pressing for time-consuming evidentiary hearings and other court proceedings, and, worst of all, by seeking to stay related administrative proceedings, litigants may postpone or prevent important agency action inimical to their interests. Even if such suits are ultimately unsuccessful on the merits, they may nevertheless achieve their intended results. The present case well illustrates this point, for as long as respondent can keep its district court action alive, it can effectively prevent discussions between FCC members and their European counterparts that might endanger respondent's profitable preferred status. This Court should grant review to prevent such unwarranted interference with the administrative process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-1721, 80-2324 and 80-2401

ITT WORLD COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

SOUTHERN PACIFIC COMMUNICATIONS COMPANY, RCA GLOBAL COMMUNICATIONS, INC., INTERVENORS

ITT WORLD COMMUNICATIONS, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

ITT WORLD COMMUNICATIONS, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION.

Argued April 16, 1982
Decided Feb. 1, 1983

Before TAMM and MIKVA, Circuit Judges, and BAZELON, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge BAZELON.

BAZELON, Senior Circuit Judge:

These appeals present a variety of important questions arising under the Communications Act of 1934,[1] the Freedom of Information Act ("FOIA"),[2] the Government in the Sunshine Act ("Sunshine Act"),[3] and the

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[1] As amended, 47 U.S.C. § 151 *et seq.* (1975 & Supp. IV 1980).

[2] 5 U.S.C. § 552 (1976 & Supp. V 1981).

[3] *Id.* § 552b

Administrative Procedure Act ("APA").[4] The issues all grow out of a series of international conferences organized by the Federal Communications Commission ("FCC" or "Commission"). Since 1974, the FCC's Telecommunications Committee ("Committee") has periodically met with representatives of foreign telecommunications administrations and carriers to discuss matters of common concern, particularly the planning of shared facilities. These gatherings, known as "consultative process" ("CP") meetings, have routinely been transcribed and open to all interested parties, including representatives of American carriers. Beginning late in 1979, however, the Committee moved to expand the focus of the CP meetings and to exclude American carriers from the expanded discussions.[5]

One of the excluded carriers, ITT World Communications, Inc. ("ITT"), has since engaged in a two-front campaign to have these meetings reopened. The present appeals concern both prongs of that campaign. In Numbers 80-2324 and 80-2401, ITT appeals a judgment of the district court dismissing its complaint that the Committee's actions at the closed meetings are *ultra vires*. The Commission cross-appeals accompanying judgments rendered against it under FOIA and the Sunshine Act.[6] In Number 80-1721, ITT petitions for review of a Commission order denying its petition for a rulemaking that would establish regulations governing the conduct of the CP.[7]

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[4] *Id.* § 551 *et seq.*

[5] *See infra* notes 16-26 and accompanying text.

[6] *See ITT World Communications, Inc.* v. *FCC*, Civ. No. 80-0428 (D.D.C. Oct. 17, 1980) [hereinafter cited without cross-reference as "District Court Opinion"], *reprinted in* Joint Appendix ("JA") at 148-55.

[7] *See* Petition of ITT World Communications, Inc., 77 F.C.C.2d 877 (1980) [hereinafter cited as "Rulemaking Denial"].

On January 2, 1981, this court denied ITT's motion to consolidate these appeals, but directed that they be presented on the same day before the same panel.

For the reasons set forth below, we
(1) reverse the district court's dismissal of ITT's *ultra vires* complaint and remand for further proceedings;
(2) affirm in part, reverse in part, and remand in part the district court's order directing the Commission to disclose all materials identified in response to ITT's FOIA request;
(3) affirm the district court's determination that the CP meetings are governed by the provisions of the Sunshine Act; and
(4) reverse in part and remand in part the Commission's rulemaking denial.

I. BACKGROUND

A. *The Closed CP Meetings*

International record service[8] has long been dominated, at the American end, by four firms known as the International Record Carriers ("IRCs").[9] ITT is one of those carriers.[10] In an effort to foster greater competition in this field,[11] the Commission in 1977 authorized

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[8] Record service is the telecommunication of information in written or graphic form, and includes telegram, telex, and teletypewriter exchange services. The Commission is taking steps to eliminate the regulatory distinction between record and voice communications. *See Western Union Int'l, Inc.* v. *FCC*, 673 F.2d 539, 541 & n. 4 (D.C.Cir. 1982).

[9] For background, see Preliminary Audit and Study of Operations of Int'l Carriers, 75 F.C.C.2d 726 (1980); H.R. REP. No. 356, 97th Cong., 1st Sess. 5, 25-32, U.S. Code Cong. & Admin. News 1981, p. 2730 (1981).

[10] The other major IRCs are Western Union International, Inc., RCA Global Communications, Inc., and TRT Communications Corporation. Together these four carriers have a 98.5% share of American traffic in the international record communications market. H.R. REP. No. 356, 97th Cong., 1st Sess. 31 (1981) (chart 14) (1980 figures). RCA has intervened in No. 80-1721 in support of ITT's rulemaking petition.

[11] The Commission's international competition policies parallel its efforts with respect to domestic record service. *See generally Western Union Tel. Co.* v. *FCC*, 665 F.2d 1126 (D.C.Cir.

two smaller common carriers, GTE Telenet Communications Corp. ("Telenet") and Graphnet Systems, Inc. ("Graphnet"), to offer specialized international service.[12] The Commission's competition policy, however, has met a formidable obstacle: American carriers obviously cannot provide international service without links to correspondent carriers abroad,[13] and to date Telenet and Graphnet have been unable to secure interconnection agreements with European administrators.[14] The foreign administrations apparently oppose greater competition in the private sector, preferring instead to deal exclusively with the established American carriers.[15]

1981); *Western Union Tel. Co.* v. *FCC*, 665 F.2d 1112 (D.C.Cir. 1981).

[12] Graphnet Syss., Inc., 63 F.C.C.2d 402 (1977), *aff'd in part and remanded in part sub nom. ITT World Communications, Inc.* v. *FCC*, 595 F.2d 897 (2d Cir. 1979). Departing from its usual practice, the Commission granted these authorizations even though Telenet and Graphnet had not yet obtained the necessary interconnection agreements to commence international service. This prompted the Second Circuit to remand for the Commission to make the two carriers' authorizations contingent on their obtaining operating agreements within a reasonable time. 595 F.2d at 902-03.

[13] United States carriers technically own and control the overseas circuits only to a fictional midpoint, where fictional "handoffs" to correspondent foreign carriers occur. The participating carriers divide revenues according to negotiated agreements. *See RCA Communications, Inc.* v. *United States*, 43 F. Supp. 851, 853 (S.D.N.Y. 1942).

[14] See Brief for Respondents in No. 80-1721, at 7 [hereinafter cited without cross-reference as "FCC Brief"]. Telecommunications services in most countries are provided by government agencies known as "administrations"; these agencies are also referred to as "PTTs" (Postal, Telephone, and Telegraph authorities).

[15] *See generally* Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 885; H.R.REP. No. 356, 97th Cong., 1st Sess. 10-13, 35-36, 39-40 (1981). *See also* 1 Martech Strategies, Inc., Competition and Deregulation in International Telecommunications 12 (July 10, 1981) (contracted report for National Telecommunications and Information Administration), *quoted in* H.R.REP. No. 356, *supra*, at 36:

In response, the Commission in 1979 turned to the consultative process as a forum for encouraging foreign cooperation with the newly authorized carriers. The CP had been initiated five years earlier as a means to exchange and discuss technical information related to the operation of jointly owned communications facilities; meetings were transcribed and open to all interested parties.[16] At the October 1979 CP meeting in Dublin,

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> ...The PTTs overwhelmingly prefer the status quoo [*sic*] to the changes proposed by the Commission. In essence, they perceive the proposed changes as challenging their monopoly position and control over telecommunications usage and pricing of services. European PTTs appear relatively satisfied with the existing international telecommunications industry structure .... The PTTs also claimed that the decisions would not substantially result in improved services to their customers.
>
> The intense oposition [*sic*] on the part of foreign PTTs to the FCC's restructuring proposals established a formidable barrier to entry, if not a block, in the near term.

In an effort to circumvent this unwillingness, Congress recently enacted the Record Carrier Competition Act of 1981, Pub. L. No. 97-130, 95 Stat. 1687 (to be codified at 47 U.S.C. § 222). That Act directs American record carriers with overseas interconnections to make their circuits available to carriers without interconnectons "upon terms and conditions which are just, fair, and reasonable." 47 U.S.C.A. § 222(c)(1)(A)(i) (West Supp. 1982). If a foreign administrtion refuses to assign American-bound record traffic to a carrier without an interconnection agreement, the assigned carrier must pass along to the unassigned carrier a share of traffic proportionate to the level of foreign-bound traffic generated by the unassigned carrier. *Id.* § 222(c)(1)(A)(ii)(I). Although not affecting the operational practices of the interconnecting foreign carriers, this arrangement therefore has the effect of promoting competition among American record carriers and "reduc[ing] the ability of monopoly foreign administrations to impede competition." H.R.REP. No. 356, *supra*, at 12-13, U.S. Code Cong. & Admin. News 1981, pp. 2738-39.

[16] For background on the CP, see AT&T Co. (TAT-7), 73 F.C.C.2d 248, 254-55 (1979); Policies for Overseas Common Carriers, 73 F.C.C.2d 193 (1979). The technical exchanges are intended to "lead to the formulation of ... traffic forecasts, data bases and analytical methodologies for assessing the service reliability and economical aspects of facilities alternatives." *Policies, supra*, 73 F.C.C.2d at 195.

Ireland, however, the Telecommunications Committee persuaded its foreign counterparts to expand the meeting's focus to include "the United States' authorization of new telecommunications services and carriers" and to exclude representatives of American carriers from this part of the meeting.[17] In addition to the Dublin meeting, a February 1980 meeting in Ascot, England, and an October 1980 meeting in Madrid, Spain, were closed during discussions of this topic.

The specific nature of these off-the-record discussions is sharply contested and cuts to the heart of these appeals. Conceding that "international negotiation is the province of the State Department,"[18] the Commission characterizes the closed encounters as merely "informal talks" that, like the public CP meetings, facilitate "the exchange of information and views."[19] More precisely, the sessions are designed "to improve foreign understanding of the bases for and the nature of our pro-competition policies and, at the same time, to increase our knowledge of any unique telecommunications problems or policies which may exist in a particular country"[20] According to the Commission, the Committee does not officially lobby on the Commission's behalf: To the extent that "some commissioners have *encouraged* the foreign entities to cooperate with the policies of the FCC," as opposed to merely *informing* them of Commission policies, "these comments represent the personal views of the Commissioners, not official agency policy . . ."[21]

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[17] FCC Brief at 9.

[18] Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 884 n.4.

[19] *Id.* at 883, 885; *see also* FCC Brief at 20, 24, 30; Brief for FCC in Nos. 80-2324 & 80-2401, at 3, 20, 23 & n.11 (filed on behalf of the FCC by the Department of Justice) [hereinafter cited without cross-reference as "DOJ Brief"] Affidavit of Comm'r Robert E. Lee (Oct. 23, 1980) [hereinafter cited without cross-reference as "Lee Affidavit"], *reprinted in* JA at 587-89.

[20] Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 885.

[21] Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, at 24 (emphasis

ITT argues that the Committee's efforts at the closed meetings constitute negotiation, and there is considerable evidence that would appear to contradict the Commission's characterization of the discussions as mere unofficial "information exchanges." First, the Commission concedes that Committee members attend CP meetings in their official capacities,[22] and indeed argues that their attendance is necessary to discharge its statutory duty to regulate international communications.[23] Second, Commission representatives have described the closed exchanges as a "mechanism" to "narrow differences and to move toward consensus ... on common principles and approaches";[24] the Commission acknowledges that such consensus is designed to "lead ultimately to operating agreements for ITT's competitors."[25] Finally, ITT presents evidence that the Commission has used the meetings as a forum to advise foreign administrations of a linkage between their cooperation with the newly authorized American carriers and the Commission's receptivity to their needs in other areas.[26]

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added) [hereinafter cited without cross-reference as "FCC District Court Memorandum"], *reprinted in* JA at 514. *See also* FCC Brief at 31-32 n. 26; DOJ Brief at 21-24; Lee Affidavit ¶ 2, *reprinted in* JA at 587.

[22] *See* DOJ Brief at 24.

[23] *See* Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 883, 884-85. *See also infra* notes 37-39 and accompanying text.

[24] Telex from Robert R. Bruce, General Counsel, FCC, to Robert Seguin, Vice-President, Teleglobe Canada, at 3-4, 9-10 (Mar. 19, 1979), *reprinted in* JA at 218-19, 224-25. *See also infra* note 26 and accompanying text.

[25] FCC Brief at 24; *see also id*, at 4; Affidavit of Willard L. Demory, ¶ 8 (Feb. 13, 1981) ("The Europeans appreciate the opportunity to communicate with us directly and prefer this to [discussions] through diplomatic channels.") [hereinafter cited without cross-reference as "Demory Affidavit"], *reprinted in* DOJ Brief at 4a.

[26] For example, Commission Chairman Chairman Charles Ferris asserted in 1979 that the Committee seeks to apply "leverage" at the meetings to "bring a greater sense of urgency to our correspondents overseas so that they will give due consider-

B. *The Rulemaking Proceeding*

ITT filed a petition for rulemaking on October 29, 1979. After questioning the Commission's authority to meet privately with foreign administrations on behalf of individual American carriers, ITT proposed that if such contacts continue they should be governed by published rules of policy and procedure. Such rules, it argued, are necessary to guard against Commission prejudgment of pending and future proceedings, to protect against *ex parte* influences, to ensure an effective record for judicial scrutiny of any disputes growing out of the meetings, and generally to enhance the quality of the CP exchanges.

ITT characterized its proposed rules as addressed to "the what" and "the how" of CP meetings.[27] With respect to "the what," ITT proposed that the Commission (1) "expressly disclaim[ ] any intention to negotiate with foreign administrations";[28] (2) delineate the authority of commissioners attending CP meetings; and

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ation to the competitive environment . . . [we] have in the United States." *Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 96th Cong., 1st Sess. 1578, 1586 (1979) (remarks of Chairman Charles D. Ferris). Referring to Commission authorizations of transatlantic communications cables (TATs), another commissioner has stated that the FCC expects a "'tit' for 'tat'" and a "quid pro quo." Transcript of Montreal CP Meeting, at 108-09 (Mar. 22, 1979) (remarks of Comm'r Joseph R. Fogarty), *reprinted in* JA at 229-30. Similarly, another commissioner has said that the Committee is "talking to people in a negotiating stance abroad." Transcript of FCC Open Meeting, at 2 (Apr. 22, 1980) (remarks of Comm'r Abbott Washburn), *reprinted in* JA at 415. *See also id.* at 5 (remarks on Comm'r Robert E. Lee), *reprinted in* JA at 418; Transcript of FCC Open Meeting, at 9-10 (Feb. 8, 1980) (remarks of Comm'r Fogarty), *reprinted in* JA at 409-10.

[27] Petition for Rulemaking Concerning Contacts Between the F.C.C. and Foreign Telecommunications Administrations, RM 3523, at 2 (filed Oct. 24, 1979) [hereinafter cited without cross-reference as "Rulemaking Petition"], *reprinted in* JA at 16-40.

[28] *Id.* at 22-23, *reprinted in* JA at 37-38.

(3) direct commissioners to refrain from discussing pending proceedings at the meetings or "advancing the interest of one American carrier or service at the expense of any other."[29] With respect to "the how," ITT proposed that the Commission (1) require the transcription or recording of all CP meetings; (2) open the meetings to the public in accordance with the requirements of the Sunshine Act; (3) provide comprehensive notice-and-comment procedures prior to the meetings;[30] and (4) provide an opportunity for interested parties to make oral or written presentations at the meetings.

After receiving comments and reply comments,[31] the Commission on May 2, 1980, released its order denying ITT's petition. The Commission addressed itself to four issues:

> (1) whether the Commission has engaged in "negotiations"; (2) whether the Commission has statutory power to make *any* contacts with foreign governments or telecommunications entities; (3) whether the *Government in the Sunshine Act* is applicable; and (4) whether there are *ex parte* and other due process questions involved here.[32]

The Commission devoted a substantial part of its discussion to the first issue. Characterizing the closed discussions as "[i]nformal talks ... to improve foreign

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[29] *Id* at 23, *reprinted in* JA at 38.

[30] Specifically, the petition asked the Commission to (a) provide at least 30 days' notice in advance of any meeting with representatives of foreign administrations or telecommunications entities of the time, place, and subject matter of the proposed discussions; (b) provide all interested parties the opportunity to comment on the "propriety or wisdom" of the proposed agenda and to propose additional subjects for discussion; and (c) issue another public notice responding to all comments received. *See id.* at 23-24, *reprinted in* JA at 38-39.

[31] Comments were filed by RCA Global Communications, Satellite Business Systems, Southern Pacific Communications Company, Telenet, and Graphnet; reply comments were filed by ITT, RCA, and Western Union International. See JA at 44-131.

[32] Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 882 (emphasis in original).

understanding,"[33] it insisted that it had not ventured "into the area of formal international negotiation."[34] According to the Commission, negotiation "connotes a formal diplomatic process for the development and formulation of various kinds of binding executive agreements and treaties."[35] The parties at the CP meetings, however, have not formulated such accords. Moreover, "participants in such negotiations ordinarily have authority to speak for their respective countries and to commit them," subject to formal ratification procedures.[36] The Telecommunications Committee, on the other hand, has no authority to bind our government to any agreements. This lack of negotiating authority, the Commission added, is clearly understood by foreign administrations.

Turning to its authority to engage in informal talks, so construed, the Commission concluded that "contacts with foreign administrations are not only permissible but are encouraged by the Communications Act."[37] Citing sections in the Act that grant it authority to license international communication by wire and radio,[38] the Commission characterized the discussions as a means to "advance our progress toward realization of statutory goals" and as "a necessary and natural corollary" of its statutory authority.[39]

The Commission then considered whether the CP discussions are "meetings" within the meaning of the Sunshine Act. The Act defines a "meeting" as "the deliberations of at least the number of individual agency

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[33] *Id.* at 885.

[34] *Id.* at 883.

[35] *Id.*

[36] *Id.* at 884.

[37] *Id.* at 882; *see also id.* at 884.

[38] *Id.* at 884-85 & n. 6. The Commission cited sections 1, 214, 301, 303(n), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 214, 301, 303(n), 303(r) (1976). It also invoked section 201(c) of the Communications Satellite Act of 1962, 47 U.S.C. § 721(c) (1976).

[39] Rulemaking Denial, *supra* note, 7, 77 F.C.C.2d at 885.

members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business."[40] The Commission concluded that, for two reasons, this definition does not encompass the consultative process. First, the presence of at least four of the seven commissioners—a quorum—is required for the Commission to transact business, unless it delegates authority pursuant to 47 U.S.C. § 155(d)(1)(1976).[41] The Commission has not delegated authority to the Committee to act on its behalf at the CP sessions, however, and because only three commissioners sit on the Committee, the threshold requirement of an authorized quorum has not been met. Second, because informal exchanges of information are not a "deliberative process," the Committee's activities do not constitute "the joint conduct or disposition of official agency business."

The Commission concluded that "[m]ost of ITT's remaining arguments are in reality addressed to the advisability, rather than the legality, of informal discussions with foreign administrations."[42] It labelled ITT's prejudgment and *ex parte* arguments as "speculative," and argued that existing rules adequately protect against these dangers.[43]

The Commission did, however, announce that as a discretionary matter it would (1) provide a notice-and-comment period on the time and place of each individual meeting, the persons expected to attend, and the topics to be discussed; (2) open the meetings to observers "unless it is determined that circumstances exist which warrant closure";[44] and (3) hold public briefings before and after the meetings. The Commission emphasized that "[t]hese procedures are flexible, and we expressly reserve the right to depart from them where necessary

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[40] 5 U.S.C. § 552b(a)(2) (1976).

[41] *See infra* note 145 and accompanying text.

[42] Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 887.

[43] *Id.*

[44] *Id.* at 888.

to accommodate any special circumstances which may arise with respect to a specific conference."[45]

This petition for review followed. ITT maintains that the Commission's order denying its rulemaking petition is arbitrary, capricious, an abuse of discretion, and contrary to law.

C. *The District Court Action*

ITT filed this action on February 12, 1980, while the Commission was considering its rulemaking petition.[46] Its complaint asserts three claims for relief:

Count I ("the *ultra vires* count") alleges that the Commission has used the closed CP meetings to negotiate with foreign governments on behalf of ITT's competitors, and it asserts that the alleged negotiations "are unlawful and *ultra vires*, and in excess of the authority conferred on the FCC by the Communications Act."[47] The count asks for declaratory and injunctive relief.

Count II ("the FOIA count") seeks disclosure under FOIA of a number of documents pertaining to the regulation of international record service.

Count III alleges that the Telecommunications Committee's participation in the closed CP discussions violates the Sunshine Act's open meeting rules.

The Commission moved for dismissal or summary judgment, and ITT cross-moved for summary judgment on the FOIA and Sunshine Act counts. The district court(1) dismissed the *ultra vires* count, holding that ITT did not have standing to secure judicial review and that the issue was not ripe for adjudication; (2) granted ITT's motion for summary judgment on the FOIA count, holding that the Commission had failed to substantiate its claim of "deliberative process" privilege

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[45] *Id.*

[46] Complaint, *ITT World Communications, Inc.* v. *FCC*, Civ. No. 80-0428 (D.D.C.) (filed Feb. 12, 1980) [hereinafter cited without cross-reference as "Complaint"], *reprinted in* JA at 196-208.

[47] *Id.* ¶ 22, *reprinted in* JA at 204.

with respect to the disputed documents; and (3) granted ITT's motion for summary judgment on the Sunshine Act count, holding that the CP discussions are "meetings" within the meaning of the Act.

ITT appeals the district court's dismissal of the *ultra vires* count. The Commission cross-appeals the court's summary judgment on the FOIA and Sunshine Act counts. Because our review of the district court action sheds considerable light on issues presented by the rulemaking denial, we first consider in turn the three counts of ITT's complaint.

II. THE *Ultra Vires* COUNT

The district court "seriously doubt[ed]" whether it had subject matter jurisdiction over the *ultra vires* count.[48] It did not reach this issue, however, dismissing instead on standing and ripeness grounds. We conclude that the district court's reservations about its jurisdiction were unfounded and that it erred in its rulings on standing and ripeness.

A. *Subject Matter Jurisdiction*

ITT argues that the district court has jurisdiction to hear the *ultra vires* claim under 28 U.S.C. § 1331 (1976 & Supp. V 1981), the general grant of federal question jurisdiction. The Commission counters that jurisdiction over the issue lies exclusively with this court as part of our review of the order denying ITT's petition for rulemaking. Invoking 28 U.S.C. § 2342(1) (1976) and 47 U.S.C. § 402(a)(1976), which together grant exclusive jurisdiction to review FCC final orders to the courts of appeals, the Commission argues that the *ultra vires* count is a collateral attack against that part of its order defining the scope of its authority to meet with foreign administrations. District court intervention, the Commission contends, would therefore circumvent the prescribed review procedure and require an "unwarranted duplication of the work of the Court of Appeals."[49]

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[48] District Court Opinion at 4, *reprinted in* JA at 151.

[49] FCC District Court Memorandum at 3, *reprinted in* JA at 493; *see also* DOJ Brief at 14-15.

A strong presumption against concurrent district court jurisdiction would be appropriate if the issues presented by ITT's rulemaking petition and its *ultra vires* count were indeed identical.[50] The Commission's argument, however, blurs an important distinction between the rulemaking petition and the *ultra vires* count. The petition asked the Commission for a declaration of the nature of its authority with respect to the CP meetings and argued that "negotiation" is outside the scope of that authority. The Commission fully agreed that it has no authority to negotiate, but it disagreed as to the necessity of rules spelling out this lack of authority with greater clarity. The gravamen of the *ultra vires* count is very different. There ITT asserts that the Commission, irrespective of what it acknowledges as the proper scope of its authority, has *in fact* secretly exceeded that authority and will not admit to having done so. Contrary to the Commission's argument that "[t]he specific content of the CP meetings is only evidence for [the] general issue" of the scope of its authority,[51] the "content" of the meetings is *itself* the issue.

We have emphasized that the jurisdiction of the district court is properly invoked where *de novo* judicial factfinding is necessary for a fair examination of the disputed issues.[52] The instant controversy presents a

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[50] *See, e.g., Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422, 85 S.Ct. 551, 558, 13 L.Ed.2d 386 (1965); *City of Rochester* v. *Bond*, 603 F.2d 927, 931 (D.C.Cir. 1979); *Independent Cosmetic Mfrs. & Distributors, Inc.* v. *United States Dep't of HEW*, 574 F.2d 553, 555 & n. 2 (D.D.Cir.), *cert. denied*, 439 U.S. 893, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978); *Nader* v. *Volpe*, 446 F.2d 261, 266-68 (D.C.Cir. 1972). *See also* 5 U.S.C. § 703 (1976).

[51] DOJ Brief at 15.

[52] *See, e.g., Amusement & Music Operators Ass'n* v. *Copyright Royalty Tribunal*, 636 F.2d 531, 533-34 (D.C.Cir. 1980) ("[A]gency action is aptly examined in the District Court when the court proceeding is to be *de novo* and based on a new record compiled in the court itself. Where review is to be on the *agency record*, the Court of Appeals is well suited to consider the challenge in the first instance.") (emphasis in original) (footnote

paradigm of this circumstance. Rather than call for review of an agency action that has itself been embodied in a record, the *ultra vires* count requires scrutiny of conduct occurring outside the formal administrative process. The agency "record" in the rulemaking denial, which consists simply of the Commission's conclusory assertions that it has not negotiated and of certain statements by Commission officials that contradict these assertions, is manifestly inadequate for such an evaluation.[53] ITT's colorable *ultra vires* claim can therefore be tested only through the kind of independent, *de novo* factfinding appropriate in the district court.[54]

The Commission seems to argue, however, that even if its *instant* order does not provide a suitable vehicle for review, *future* agency actions based on its alleged *ultra vires* conduct would, so that district court intervention would nevertheless be unwarranted. Thus, the Commission asserts that if it "take[s] some action detrimental to ITT in the future, as a *quid pro quo* for European cooperation today," ITT "would have the opportu-

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omitted), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1352, 67 L.Ed.2d 336 (1981); *Investment Co. Inst.* v. *Board of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1278 (D.C.Cir. 1977) (order reviewable in court of appeals "is interpreted to mean any agency action capable of review on the basis of the administrative record"); *Deutsche Lufthansa Aktiengesellschaft* v. *CAB*, 479 F.2d 912, 916 (D.C.Cir. 1973) ("It is the availability of a record for review ... which is now the jurisdictional touchstone."); *Independent Broker-Dealers' Trade Ass'n* v. *SEC*, 442 F.2d 132, 143 (D.C.Cir.), *cert. denied*, 404 U.S. 828, 92 S.Ct. 63, 30 L.Ed.2d 57 (1971).

[53] For more on the Commission's rulemaking record, *see infra* notes 194-202 and accompanying text.

[54] As discussed *infra* Part V-B, we cannot affirm the Commission's order denying ITT's rulemaking petition on the basis of the record before us. There is some tension between our remand of that order for further consideration and our remand of the *ultra vires* count for district court factfinding; the practical effect of our decision is that both the district court and the Commission will consider the nature of the Committee's off-the-record activities. We discuss coordination of this "double remand" *infra* p. 1248.

nity ... to challenge *that* action and its basis" in a statutory review proceeding.[55]

Again, however, the Commission misstates the focus of ITT's allegations. Where an agency action is not reviewable in the courts of appeals, district court jurisdiction may nevertheless be inappropriate if the action is interlocutory in nature and can be corrected on court-of-appeals scrutiny of a subsequent, final action.[56] We have emphasized, however, that such preclusion of district court review is inappropriate where the challenged action would be "beyond the capabilities of the statutorily-prescribed methods of review to repair."[57] Such a danger of "irretrievable subversion" of ITT's "substantial rights"[58] is readily apparent in this case. The Committee's activities at the CP meetings are not calculated to result in a final order, but rather to lead to unreviewable action by foreign administrations. Thus, as we discuss more fully in Part II-C below, subsequent judicial or administrative proceedings would not likely provide an adequate remedy for the Commission's alleged misconduct. The district court therefore has subject matter jurisdiction over the *ultra vires* count.[59]

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[55] FCC Brief at 24 (emphasis added).

[56] *See, e.g., Association of Nat'l Advertisers, Inc.* v. *FTC*, 617 F.2d 611, 619-22 (D.C.Cir 1979); *id.* at 626 (Wright, C.J., concurring in the result); *see also* 5 U.S.C. § 704 (1976). This preference for statutory remedies reflects important policies, including deference to administrative expertise, respect for administrative autonomy, and avoidance of piecemeal review. *See, e.g., City of Rochester* v. *Bond, supra* note 50, 603 F.2d at 936; *Nader* v. *Volpe, supra* note 50, 466 F.2d at 267-68. It also embodies aspects of ripeness, exhaustion, and finality doctrines. *See, e.g., Association of Nat'l Advertisers, Inc.* v. *FTC, supra*, 617 F.2d at 620-21; *Nader* v. *Volpe, supra* note 50, 466 F.2d at 268; *cf. Gulf Oil Corp.* v. *United States Dep't of Energy*, 663 F.2d 296, 307-13 (D.C.Cir. 1981).

[57] *Association of Nat'l Advertisers, Inc.* v. *FTC, supra* note 56, 617 F.2d at 621 (footnote omitted).

[58] *Nader* v. *Volpe, supra* note 50, 466 F.2d at 266, 269.

[59] The Commission argues that district court jurisdiction is appropriate only where there is a demonstrated, "patent" violation of agency authority, and that "[w]hatever this Court's ultimate view of the scope of the FCC's authority ... it surely is

B. *Standing*

Under the Administrative Procedure Act, a party has standing to secure judicial review of any "agency action" that causes a "legal wrong."[60] The district court held that ITT has not suffered a legal wrong, reading its complaint solely to allege a violation of the Logan Act's prohibition of unauthorized negotiation with foreign governments.[61] Because only the Department of State is aggreived by violations of that criminal statute, the court reasoned, ITT's alleged injury is not legally cognizable.

We respectfully conclude that the district court misread ITT's complaint. The gravamen of ITT's allegation is quite specific. "The activities of the FCC . . . are unlawful and *ultra vires*, and in excess of the authority

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not acting in violation of any *clear* statutory prohibition or committing any *patent* violation of its authority." DOJ Brief at 16 (emphasis added). The "patent violation" doctrine is well established, *see, e.g., Leedom* v. *Kyne*, 358 U.S. 184, 188-91, 79 S.Ct. 180, 183-85, 3 L.Ed.2d 210 (1958); *Independent Cosmetic Mfrs. & Distributors, Inc.* v. *United States Dep't of HEW*, *supra* note 50, 574 F.2d at 555, but it is inapposite to the instant controversy. Contrary to the Commission's suggestions, the doctrine is *not* designed to restrict general federal question jurisdiction over agency actions to a small category of egregious cases, or to subject plaintiffs to a high burden in alleging a *prima facie* case of agency misconduct. Rather, the doctrine is properly invoked only where district court jurisdiction would otherwise be entirely concurrent with that of the courts of appeals—that is where reliance on statutory review would provide thorough examination of the issues and ensure adequate relief on appeal. This is not a case of true concurrency, however, because (1) *de novo* factfinding is necessary, and (2) subsequent statutory review would accord ineffectual relief.

[60] 5 U.S.C. § 702 (1976).

[61] The Logan Act, 18 U.S.C. § 953 (1976), prohibits unauthorized "correspondence or intercourse" by United States citizens

> with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States.

conferred on the Commission by the *Communications Act.*"[62] Whether the complaint's two references to the Logan Act[63] should be construed as an attempt to state a separate cause of action (as the Commission insists) or as mere illustrative matter not intended to assert a claim (as ITT argues), a cause of action under the Communications Act has clearly been alleged.

As a regulated carrier, ITT has standing to complain of *ultra vires* Commission actions that threaten it with competitive injury.[64] If ITT's allegations are correct,[65] the Commission is engaged in a course of conduct that clearly rises to the level of reviewable "agency action."[66] If successful, that action will cause

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[62] Complaint ¶ 22, *reprinted in* JA at 204 (emphasis added).

[63] *Id.* ¶¶ 10, 21, *reprinted in* JA at 199, 203-04.

[64] On the rules governing standing, see generally *Bryant* v. *Yellen*, 447 U.S. 352, 366-68, 100 S.Ct. 2232, 2340-41, 65 L.Ed.2d 184 (1980); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-46, 96 S.Ct. 1917, 1923-28, 48 L.Ed.2d 450 (1976); *Association of Data Procesing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 151-55, 90 S.Ct. 827, 829-30, 25 L.Ed.2d 184 (1970); *Control Data Corp.* v. *Baldridge*, 655 F.2d 283, 288-89 (D.C.Cir.), *cert. denied*, 454 U.S. 881, 102 S.Ct. 363, 70 L.Ed.2d 190 (1981).

[65] As we assume in reviewing the district court's dismissal. *See, e.g., Warth* v. *Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).

[66] *See, e.g., Writers Guild of America, West Inc.* v. *American Broadcasting Co., Inc.*, 609 F.2d 355, 365 (9th Cir. 1979) ("Regulation through 'raised eyebrow' techniques or through forceful jawboning is commonplace in the administrative context, and in some instances may fairly be characterized ... as official action by the agency.") (footnotes omitted), *cert. denied*, 449 U.S. 824, 101 S.Ct. 85, 66 L.Ed.2d 27 (1980); *Hercules, Inc.* v. *FPC*, 552 F.2d 74, 77-78 (3d Cir. 1977) ("jawboning strategy"); *Independent Broker-Dealers' Trade Ass'n* v. *SEC*, *supra* note 52, 442 F.2d at 137-43 (informal pressure tactics); *Moss* v. *CAB*, 430 F.2d 891, 897-900 (D.C.Cir. 1970) (same). *Compare Illinois Citizens Comm. for Broadcasting* v. *FCC*, 515 F.2d 397, 402 (D.C. Cir. 1974) (individual commissioner's speech representing unofficial views not "agency action"). *Cf. Consolidated Edison Co. of New York, Inc.* v. *FPC*, 512 F.2d 1332, 1341-43 (D.C.Cir.), *clarified*, 518 F.2d 448 (D.C.Cir. 1975).

substantial injury to ITT's economic interests.[67] Moreover, there can be no question that the interests sought to be protected by ITT are within the Communications Act's broad zone of protected interests.[68] The Commission's argument that ITT has no right to avoid enhanced competition misses the mark. ITT has standing to insist that the Commission *implement* its competi-

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[67] It might be argued, although the Commission has not done so, that the presence of foreign administrations in the causal chain makes ITT's threatened injuries too speculative. It is not inconceivable that, independent of the Commission's efforts, the foreign administrations will enter into operating agreements with the new American carriers. The record shows that European opposition to the new competition is intense, however, and ITT's complaint is that the Commission's "negotiations" and "leverage" are likely to override this intransigence. The Commission *itself* acknowledges the causal nexus, conceding that its behind-the-scenes actions are designed to effectuate operating agreements for the new carriers. *See supra* notes 24-25 and accompanying text. ITT's allegations have therefore established a sufficient likelihood that the relief it requests will benefit it in a tangible, perceptible way. *Compare Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978); *United States* v. *SCRAP*, 412 U.S. 669, 688-90, 93 S.Ct. 2405, 2416-17, 37 L.Ed.2d 254 (1973); *Natural Resources Defense Council, Inc.* v. *SEC*, 606 F.2d 1031, 1042-43 & n. 11 (D.C.Cir. 1979) *with Warth* v. *Seldin*, *supra* note 65, 422 U.S. at 505, 95 S.Ct. at 2208; *Winpisinger* v. *Watson*, 628 F.2d 133, 138-39 (D.C.Cir. 1980).

[68] *See, e.g., Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, *supra* note 64, 397 U.S. at 153, 90 S.Ct. at 829; *Columbia Broadcasting Sys., Inc.* v. *United States*, 316 U.S. 407, 422-23, 62 S.Ct. 1194, 1202-03, 86 L.Ed. 1563 (1942); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476-77, 60 S.Ct. 693, 698, 84 L.Ed. 869 (1940).

Our standing test also requires that there be no "clear and convincing" indication of congressional intent to withhold judicial review. *Control Data Corp.* v. *Baldridge*, *supra* note 64, 655 F.2d at 288-89. There is no such indication in this case.

tion policy in a manner that does not exceed its authority under the Communications Act.[69]

C. *Ripeness*

The district court held that the *ultra vires* count was not ripe for adjudication, reasoning that "[t]he two new carriers have not yet been accepted by the foreign entities. When and if they are so accepted, Plaintiff can object through the formal rulemaking process, and derive relief if its claim is cognizable and meritorious."[70]

This holding is flawed under familiar ripeness doctrine, which requires an evaluation of (1) "[t]he fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration."[71] The Committee has already engaged in three closed meetings with foreign administrations. The threatened injury to ITT resulting from these encounters does not depend on other types of Commission action. The issue whether the Committee's efforts at the meetings were unlawful is therefore eminently fit for judicial consideration.

Moreover, contrary to the district court's reasoning, a subsequent judicial proceeding would not likely pro-

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[69] We express no views on the scope of the Commission's authority to meet with foreign administrations. Nor do we consider whether the Commission's efforts on behalf of Graphnet and Telenet constitute arbitrary action with respect to other regulated carriers. *Cf. Teamsters Local Union 769* v. *NLRB*, 532 F.2d 1385, 1392 (D.C.Cir. 1976). Finally, we do not consider whether alleged attempts to "leverage" foreign administrations through facilities authorization decisions, *see supra* note 26 and accompanying text, would violate the "public convenience or necessity" standard of 47 U.S.C. § 214(a) (1976).

[70] District Court Opinion at 4-5 (citation omitted), *reprinted in* JA at 151-52.

[71] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). On ripeness doctrine, see generally *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-43, 101 S.Ct. 488, 493-95, 66 L.Ed.2d 416 (1980); *Gulf Oil Corp.* v. *United States Dep't of Energy*, *supra* note 56, 663 F.2d at 309-13.

vide an adequate remedy for the Commission's alleged misconduct.[72] Actions by foreign administrations obviously could not be overturned in American fora, and the new carriers' certificates of public convenience and necessity, awarded before the Committee began to meet privately with foreign administrations, could not be revoked on the basis of subsequent Commission misdeeds. In addition, prospective rulemaking after the foreign administrations had acted could not undo the harm that ITT seeks to prevent: coerced entry of foreign administrations into agreements with Telenet and Graphnet. The *ultra vires* issue is therefore ripe for judicial consideration.[73]

III. The FOIA Count

Three days after the first closed meeting in Dublin, ITT requested the Commission to identify and release all agency communications "with respect to dealings or possible dealings between foreign correspondents and U.S. carriers not now providing international services through direct connections with foreign correspondents."[74] The Commission released eight items but withheld fifteen others.[75] After exhausting its administra-

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[72] This inadequacy is also a touchstone of our subject matter jurisdiction analysis. *See supra* note 55-58 and accompanying text.

[73] The district court did not address the Commission's assertion that ITT failed to exhaust its administrative remedies, nor has the Commission pressed this argument on appeal.

[74] Letter from Grant S. Lewis to Executive Director, FCC, at 1 (Oct. 12, 1979), *reprinted in* JA at 159.

[75] Letter from Philip L. Verveer, Chief, Common Carrier Bureau, to Grant S. Lewis (Nov. 16, 1979), *reprinted in* JA at 161-69. Most of the items released were copies of letters and telexes between Commission officials and representatives of foreign administrations. Also released were five pages of a transcript of a CP meeting held in Montreal, Canada, in March 1979, and correspondence between ITT and the Commission. *See id.*, Attachment I, *reprinted in* JA at 167.

tive remedies,[76] ITT brought this action to compel disclosure of those items.

The Commission relies exclusively on the executive "deliberative process" privilege embodied in 5 U.S.C. § 552(b)(5) (1976) ("Exemption 5"), which protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency."[77] To sustain its burden of proof,[78] the Commission submitted an index to the documents, five affidavits, and a memorandum of points and authorities.[79]

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[76] ITT filed an Application for Review on December 17, 1979. *See* JA at 170-83. Because the Commission failed to respond to this appeal within 20 working days, *see* 5 U.S.C. § 552(a)(6)(A)(ii) (1976), ITT was deemed to have exhausted its administrative remedies, *see id.* § 552(a)(6)(C). Shortly after ITT filed its complaint the Commission acted on the appeal, refusing to disclose anything further except for factual portions of three documents. ITT World Communications, Inc. On Request for Inspection of Records, 76 F.C.C.2d 453 (1980) [hereinafter cited as "Records Denial"].

[77] The Commission argued in the district court that the attorney-client privilege, as embodied in Exemption 5, also precluded disclosure. The district court rejected that assertion, stating that the "privilege only attaches when an attorney is performing a service that only an attorney can perform, and the communications between attorney and client are made in confidence. Neither showing has been made here." District Court Opinion at 5 n.2, *reprinted in* JA at 152. The Commission has not advanced its claim of attorney-client privilege on appeal.

[78] 5 U.S.C. § 552(a)(4)(B) (1976).

[79] *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 459-61; Affidavit of H. Russell Frisby, Jr. (Apr. 15, 1980) [hereinafter cited without cross-reference as "Frisby Affidavit"], *reprinted in* JA at 340-41; Affidavit of Robert E. Gosse (June 2, 1980) [hereinafter cited without cross-reference as "Gosse Affidavit"], *reprinted in* JA at 343-46; Affidavit of James E. Graf II (June 2, 1980) [hereinafter cited without cross-reference as "Graf Affidavit"], *reprinted in* JA at 348-54; Affidavit of Sebastian A. Lasher (June 2, 1980) [hereinafter cited without cross-reference as "Lasher Affidavit"], *reprinted in* JA at 356-58; Affidavit of Elliot Maxwell (June 3, 1980) [hereinafter cited without cross-reference as "Maxwell Affidavit"], *reprinted*

The fourteen items still being withheld[80] fall into three broad categories:

(A) Seven items do not pertain directly to the CP meetings, but instead to specific docket proceedings concerning carrier authorizations and facilities planning.[81]

(B) Six items are background memoranda and draft statements for the use of commissioners in their contacts with foreign administrations.[82]

(C) One item is a compilation of staff members' notes reporting the substance of the CP discussions in Dublin.[83]

The district court granted ITT's motion for summary judgment and ordered the Commission to release all fourteen items. The court's analysis was limited to one short paragraph:

> In the instant case, *the FCC cites no specific policy or process in order to protect the documents in question.* In fact, they [sic] consistently defend the Consultative Process as a means of receiving information without having to formulate policy or utilize United States regulatory jurisdiction.... Upholding the use of Exemption 5 in the instant case "would go a long way toward undercutting the entire Freedom of Information Act," ... and detract from the Act's dominant objective of disclosure... The documents at issue herein must be disclosed.[84]

We have recurrently emphasized that "District Court decisions in FOIA cases must provide statements of law

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in JA at 365-67; FCC District Court Memorandum at 10-21, *reprinted in* JA at 500-11.

[80] After reconsideration, the Commission released item 6. Records Denial, *supra note* 76, 76 F.C.C.2d at 457 n. 10.

[81] Items 4, 9, 11, 12, 13, 14, and 15. *See infra* notes 88-94 and accompanying text.

[82] Items 2, 3, 5, 7, 8, and 10. *See infra* notes 107-08 and accompanying text.

[83] Item 1. *See infra* note 122 and accompanying text.

[84] District Court Opinion at 6, *reprinted in* JA at 153 (emphasis added) citations omitted).

that are both accurate and sufficiently detailed to establish that the careful *de novo* review prescribed by Congress has in fact taken place."[85] Our review of the materials submitted by the Commission leads us to conclude that the district court's evaluation of the instant items did not reflect the quality of *de novo* review required by this standard. With respect to the documents listed in categories (A) and (B), we accordingly reverse the district court's disclosure order and remand for additional *de novo* proceedings.[86] Our decision does not apply to item 7, however, for we conclude that the Commission failed to carry its burden of establishing its right to withhold any of the material therein. Turning to the item listed in category (C), we conclude that the Commission has failed to carry its burden of proof, and we accordingly affirm the district court's disclosure order with respect to that item.

A. *Material Pertaining to Commission Docket Proceedings*

With one exception, each of these seven items was prepared by staff attorneys or engineering assistants to advise Commission officials on pending docket proceedings.[87] Item 4 is a legal analysis of the "Applicability of Resale Decision to international communications market," and gives advice and opinions on the applications of Graphnet and Telenet to extend their services to overseas markets.[88] Item 9 recommends how the Com-

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[85] *Founding Church of Scientology of Washington, D.C., Inc.* v. *Bell*, 603 F.2d 945, 950 (D.C.Cir. 1979) (footnote omitted); *see also Marks* v. *CIA*, 590 F.2d 997, 1010-11 (D.C.Cir. 1978) (Wright, C.J., concurring); *Schwartz* v. *IRS*, 511 F.2d 1303, 1306-07 (D.C.Cir. 1975).

[86] We reserve outright, however, with respect to item 2. *See infra* note 116 and accompanying text.

[87] The exception is item 15, a memorandum from Commissioner Fogarty to Chairman Ferris. *See infra* note 94 and accompanying text. The analysis presented in the text, however, applies with full force to this document. *See infra* notes 96-101 and accompanying text.

[88] Memorandum from Joel S. Winnik, staff attorney, to Walter R. Hinchman, Chief, Common Carrier Bureau (Aug. 25,

mission should modify the Graphnet authorization to comply with a recent judicial decision.[89] Item 11 advises a commissioner how he should vote on a proposed authorization of a new transatlantic communications cable.[90] Item 12 contains similar recommendations regarding Commission authorization of a new communications satellite.[91] Item 13 contains, *inter alia*, recommendations on factors the Commission should consider when ruling on carrier applications, and analyses of issues raised by carriers in pending docket proceedings.[92] Item 14 analyzes a tariff filing by the American Telephone and Telegraph Company and recommends how the Commission should respond.[93] Item 15 contains recommendations on whether the Commission should have a national security briefing by the Department of Defense in connection with a proposed transatlantic cable authorization.[94]

1976). *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460; Gosse Affidavit ¶ F, *reprinted in* JA at 345-46.

[89] Memorandum from Sebastian A. Lasher, engineering assistant, to Comm'r Abbott Washburn (Apr. 26, 1979). *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460; Lasher Affidavit ¶¶ 3-5, *reprinted in* JA at 356-58. The recent decision in question was *ITT World Communications, Inc.* v. *FCC*, 595 F.2d 897 (2d Cir. 1979). *See supra* note 12.

[90] Memorandum from Lawrence Katz, attorney-advisor, to Comm'r Joseph Fogarty (undated). *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 461; Graf Affidavit ¶ 7, *reprinted in* JA at 351.

[91] Memorandum from Lawrence Katz, attorney-advisor, to Comm'r Joseph Fogarty (undated). *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 461; Graf Affidavit ¶ 8, *reprinted in* JA at 352.

[92] Memorandum from Lawrence Katz, attorney-advisor, to Comm'r Joseph Fogarty (undated). *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 461; Graf Affidavit ¶ 9, *reprinted in* JA at 352-53.

[93] Memorandum from Lawrence Katz, attorney-advisor, to Comm'r Joseph Fogarty (undated). *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 461; Graf Affidavit ¶ 10, *reprinted in* JA at 353.

[94] Memorandum from Comm'r Joseph Fogarty to Chairman Charles Ferris (Oct. 5, 1978). *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 461; Graf Affidavit ¶ 11, *re-*

With respect to these items, the district court's sweeping assertion that "the FCC cites no specific policy or process in order to protect the documents"[95] is clearly erroneous. The items bear all the indicia of predecisional status.[96] They were written by subordinate agency personnel to advise Commission officials on issues presented in pending docket proceedings. The authors themselves had no decisionmaking authority; their memoranda were "recommendatory" and "deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another."[97] The items contain suggestions that could "be freely disregarded";[98] rather than expressing "the law itself," they simply contain "the ideas and theories which go into the making of the law."[99] Thus, the deliberative material in these items is without "precedential significance" and cannot be considered "secret law."[100] Finally, the Com-

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printed in JA at 353.

[95] District Court Opinion at 6, *reprinted in* JA at 153.

[96] *See generally Renegotiation Bd.* v. *Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 183-90, 95 S.Ct. 1491, 1499-03, 44 L.Ed.2d 57 (1975); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150-54, 159-60, 95 S.Ct. 1504, 1516-18, 1520-21, 44 L.Ed.2d 49 (1975); *Taxation With Representation Fund* v. *IRS*, 646 F.2d 666, 676-81 (D.C.Cir. 1981); *Brinton* v. *Department of State*, 636 F.2d 600, 604-06 (D.C.Cir. 1980), *cert denied*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981); *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 866-69 (D.C.Cir. 1980); *Jordan* v. *United States Dep't of Justice*, 591 F.2d 753, 772-74 (D.C.Cir. 1978) (en banc); *Vaughn* v. *Rosen*, 523 F.2d 1136, 1143-44 (D.C.Cir. 1975); S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965).

[97] *Coastal States Gas Corp.* v. *Department of Energy*, *supra* note 96, 617 F.2d at 866; *see also Arthur Anderson & Co.* v. *IRS*, 679 F.2d 254, 257-58 (D.C.Cir. 1982).

[98] *Coastal States Gas Corp.* v. *Department of Energy*, *supra* note 96, 617 F.2d at 869.

[99] *Sterling Drug Inc.* v. *FTC*, 450 F.2d 698, 708 (D.C.Cir. 1971); *see also Taxation With Representation Fund* v. *IRS*, *supra* note 96, 646 F.2d at 678-79.

[100] *Coastal States Gas Corp.* v. *Department of Energy*, *supra* note 96, 617 F.2d at 867, 869; *see also Renegotiation Bd.* v. *Grumman Aircraft Eng'g Corp.*, *supra* note 96, 421 U.S. at

mission did not expressly adopt any of the material in these items when it issued its final decisions in the relevant proceedings.[101]

We therefore reverse the district court's judgment ordering the disclosure of items 4, 9, 11, 12, 13, 14, 15. In accordance with previous cases, we remand to the district court for *de novo* factual determinations of two segregability issues.[102]

First, the deliberative process privilege does not protect "purely factual material appearing in ... documents in a form that is severable without compromising the private remainder of the documents."[103] On remand, the district court must ensure that *only* deliberative material in these items is withheld.

Second, the privilege does not protect material that merely sets forth official agency views and practices with respect to the interpretation and implementation of existing policies.[104] To the extent that some of the material in these items may "'embody the agency's effective law and policy,'"[105] the district court must be certain that it is excised and released.

These determinations may well require the district court to "examine the contents of [the items] *in camera* to determine whether such records or any part thereof

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185-86, 95 S.Ct. at 1500-01; *Taxation With Representation Fund* v. *IRS*, *supra* note 96, 646 F.2d at 679; *Ryan* v. *Department of Justice*, 617 F.2d 781, 790-91 (D.C.Cir. 1980).

[101] *See, e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, *supra* note 96, 421 U.S. at 161, 95 S.Ct. at 1521; *Brinton* v. *Department of State*, *supra* note 96, 636 F.2d at 605.

[102] *See, e.g.*, *Founding Church of Scientology of Washington, D.C., Inc.* v. *Bell*, *supra* note 85, 603 F.2d at 952-53; *Marks* v. *CIA*, *supra* note 85, 590 F.2d at 1003; *Mead Data Central, Inc.* v. *United States Dep't of Air Force*, 566 F.2d 242, 262-63 (D.C.Cir. 1977).

[103] *EPA* v. *Mink*, 410 U.S. 73, 91, 93 S.Ct. 827, 837, 35 L.Ed.2d 119 (1973). *See infra* notes 124, 126-31, and accompanying text.

[104] *See* cases cited *supra* note 100.

[105] *NLRB* v. *Sears, Roebuck & Co.*, *supra* note 96, 421 U.S. at 153, 95 S.Ct. at 1517 (quoting Davis, *The Information Act: A Preliminary Analysis*, 34 U.CHI.L.REV. 761, 797 (1967)).

shall be withheld" under Exemption 5.[106] The court should also take care to provide a sufficiently detailed analysis to enable thorough appellate review.

B. *Material Preparatory to the CP Discussions*

There are six items in this category. Items 2 and 3 are drafts of telexes sent by Commission Chairman Charles Ferris to his Swedish and Canadian counterparts.[107] Items 5, 7, 8, and 10 are background memoranda for the use of commissioners attending the CP meetings, and are generally claimed to contain "recommendations" and "options" on issues to be discussed, and "proposed responses should the parties reject" Commission proposals.[108]

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[106] 5 U.S.C. § 552(a)(4)(B) (1976).

[107] Item 2 consists of 6 drafts of a telex from Chairman Ferris to Torsten Larsson, Chairman of CEPT/CLTA, Central Administration of Swedish Telecommunications (Oct. 31, 1979). Item 3 is a draft of a telex from Chairman Ferris to Jean-Claude DeLorme, President, Teleglobe Canada (Oct. 31, 1979). *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 459-60; Gosse Affidavit ¶ E, *reprinted in* JA at 345. Copies of the final telexes were released. *See* Records Denial, *supra* note 76, Attachment I, 76 F.C.C.2d at 459; *see also* JA at 233-35 (reprint of telex to Chairman Larson).

[108] *See* Gosse Affidavit ¶ G, Graf Affidavit ¶ 6, Maxwell Affidavit ¶ 10, *reprinted in* JA at 346, 351, 367.

Item 5 is a 1-page section of a 28-page memorandum from Robert Gosse and James Warwick, staff attorneys, to FCC attendees of the Dublin Conference (Sept. 1979). The memorandum is entitled "Expansion of Areas of Consultative Contact," and the withheld section consists of recommendations, opinions, and options. *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460; Gosse Affidavit ¶ G, *reprinted in* JA at 346.

Item 7 is a memorandum from Russell Frisby, attorney-advisor, to James Smith, for FCC attendees of the Dublin Conference (undated). *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460; Frisby Affidavit, *reprinted in* JA at 340-41.

Item 8 is an undated memorandum prepared by Elliot Maxwell, assistant to Chairman Ferris, for Ferris's use at the Dublin Conference. It consists of proposed remarks that were not delivered, proposals for expanding the consultative process, and proposed responses to possible foreign arguments. *See* Rec-

ITT argues, and the district court agreed, that because the Commission contends that the CP meetings *themselves* are not deliberative or decisional in nature, material proparatory to the meetings cannot be withheld. We agree that the Commission has engaged in much obfuscation about the substance of these discussions. It has, however, consistently stated that the meetings involve the exchange of information *and views* concerning its competition policy. There is an important distinction between the commissioners' actual statements and the drafts and background memoranda from which those statements emerged. The commissioners' remarks were statements of proposed action[109] and explanations of agency positions[110] that, as we discuss below, are not exempt from disclosure.[111] The instant items, on the other hand, are the raw materials that went into the formulation of those remarks. Like the items discussed in part III-A, they are documents from subordinates to superiors that are merely recommendatory in nature.[112] We have held that "internal self-evaluation[s] ... about the relative merits of various positions which might be adopted" in agency dealings with the public normally fall within the deliberative privilege; this protection extends to "discussion of the merits of past efforts, alternatives currently

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ords Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460; Maxwell Affidavit ¶¶ 3-11, *reprinted in* JA at 365-67.

Item 10 is a memorandum from Angela Shaw, attorney-advisor, to Comm'r Joseph Fogarty (Dec. 16, 1976). Four of the 6 pages were released. The remainder consists of "recommendations regarding the issues to be discussed" at a CP meeting. Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460, Graf Affidavit ¶ 6, *reprinted in* JA at 351.

[109] The closed Dublin meeting for example, was largely devoted to the Commission's proposal to expand the focus of the consultative process. *See* FCC Brief at 9; Maxwell Affidavit ¶¶ 5, 8-10, *reprinted in* JA at 366-67.

[110] *See supra* notes 19-20 and accompanying text.

[111] *See infra* notes 122-37 and accompanying text.

[112] *See supra* notes 96-101 and accompanying text.

available, and recommendations as to future strategy."[113]

Moreover, the policies behind the deliberative privilege apply in full force to this advisory material. Disclosure might well discourage subordinates from "provid[ing] ... their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism."[114] Disclosure might also "confus[e] the issues and mislead[ ] the public by ... suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action."[115]

We therefore reverse the district court's disclosure order with respect to most of these items. We have examined the final telex that resulted from the drafts in item 2;[116] it consists entirely of policy proposals, and we see no purpose in remanding for further factual findings. With respect to items 3, 5, 8, and 10, however, we remand to the district court for segregability determinations in accordance with our discussion in Part III-A.

We emphasize an important caveat. A consistent assumption running through judicial decisions permitting nondisclosure of deliberative material has been that the *actual* policy or legal positions adopted will be disclosed to the public.[117] The district court should be certain

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[113] *Mead Data Central, Inc.* v. *United States Dep't of Air Force*, *supra* note 102, 566 F.2d at 257.

[114] *Coastal States Gas Corp.* v. *Department of Energy*, *supra* note 96, 617 F.2d at 866.

[115] *Id.* (citation omitted); *see also Jordan* v. *United States Dep't of Justice*, *supra* note 96, 591 F.2d at 772-74.

[116] *See* Telex from Charles Ferris, Chairman, FCC, to Torsten Larsson, Chairman, CEPT/CLTA, Central Administration of Swedish Telecommunications (Oct. 31, 1979), *reprinted in* JA at 233-35. *See also supra* note 107.

[117] *See, e.g., Renegotiation Bd.* v. *Grumman Aircraft Eng'g Corp.*, *supra* note 96, 421 U.S. at 184-85, 192, 95 S.Ct. at 1500, 1504; *NLRB* v. *Sears, Roebuck & Co.*, *supra* note 96, 421 U.S. at 151-52, 159-60, 95 S.Ct. at 1516-17, 1520-21; *Vaughn* v. *Rosen*, *supra* note 96, 523 F.2d at 1147 n. 38.

that the disclosed documents and other material will provide the public a sufficient view of the Committee's efforts at the CP meetings. If they do not, release of some of the material in these items, to the extent that it reflects positions actually taken, may well be necessary to give the public an adequate understanding of the Committee's activities.

Our decision does not apply to item 7.[118] The affidavit submitted by its author stated simply that the document "contained my thoughts on what information would be useful to the Commissioners in discussing" two issues at the Dublin conference.[119] This characterization could easily extend to simple summaries of factual information, which, as we discuss below, are not exempt from FOIA disclosure.[120] The Commission therefore failed to carry its burden of establishing any right to withhold this document,[121] and we affirm the district court's judgment ordering its disclosure.

C. *Material Reporting the CP Discussions*

Item 1 is a compilation of staff members' notes reporting the substance of the closed CP exchange at Dublin.[122] We affirm the district court's decision that this material must be released.

Communications between agency members and persons from outside the agency generally are not protected by the deliberative process privilege.[123] Because

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[118] For a description of this document, see *supra* note 108.

[119] Frisby Affidavit ¶ 3, *reprinted in* JA at 340-41.

[120] *See infra* notes 122-34 and accompanying text.

[121] *See, e.g., Coastal States Gas Corp.* v. *Department of Energy, supra* note 96, 617 F.2d at 854, 863-64, 865-66, 870.

[122] The notes were taken and compiled by two staff attorneys, Robert Gosse and James Warwick. *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 459-60; Gosse Affidavit ¶ D, *reprinted in* JA at 345.

[123] *See, e.g., County of Madison* v. *United States Dep't of Justice*, 641 F.2d 1036, 1039-41 (1st Cir. 1981); *Mead Data Central, Inc.* v. *United States Dep't of Air Force, supra* note 102, 566 F.2d at 257-58; *Washington Research Project Inc.* v. *Department of HEW*, 504 F.2d 238, 244-45 (D.C.Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 951, 44 L.Ed.2d 450 (1975). For

these notes embody such communications, they cannot acquire predecisional status simply by virtue of being circulated within the agency. Moreover, reports of extra-agency discussions are factual in nature; courts have long emphasized that factual material usually is not exempt from disclosure.[124] And unlike the background evaluative material discussed above, commissioners' comments that may be reported in these notes are actual explanations of the Commission's policies and actions. Although the public has only a marginal interest in the release of inter-Commission material debating positions to be taken at international conferences, it has a substantial interest in knowing the positions that Committee members actually take.[125]

The Commission advances three rationales against disclosure. First, it argues that "[s]uch notes are evaluative, because the persons making them were not secretaries or other neutral observers, but were FCC staff attorneys, who can be expected to write down only those comments made by speakers at the meeting that they feel are significant."[126] This argument is similar to one we recently considered—and rejected—in *Playboy Enterprise, Inc. v. Department of Justice.*[127] In that case, the government argued that a Justice Department investigative report reflected the "choice, weighing and analysis of facts," and was therefore pro-

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exceptions, see, e.g., *Forsham* v. *Harris*, 445 U.S. 169, 182-86, 100 S.Ct. 978, 985-87, 63 L.Ed.2d 293 (1980); *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-91 (D.C. 1980); and *Soucie* v. *David*, 448 F.2d 1067, 1078 n. 44 (D.C.Cir. 1971), all dealing with advisory material solicited from outside consultants as part of the deliberative process.

[124] *See EPA* v. *Mink*, *supra* note 103, 410 U.S. at 89-81, 93 S.Ct. at 836-37; *Brinton* v. *Department of State*, *supra* note 96, 636 F.2d at 604-06. For exceptions, see *infra* notes 130-31 and accompanying text.

[125] Material pertaining to foreign and defense affairs may be withheld if properly classified pursuant to executive order. *See* 5 U.S.C. § 552(b)(1) (1976). This exemption is not at issue in the instant litigation.

[126] DOJ Brief at 32.

[127] 677 F.2d 931 (D.C. Cir. 1982).

tected from disclosure by the deliberative privilege.[128] We responded:

> Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as a part of the deliberative process.[129]

Like *Playboy Enterprises*, this case is distinguishable from suits seeking disclosure of staff summaries of record evidence in adjudicatory and rulemaking proceedings.[130] The courts in such cases have found that, where analyses are prepared for the sole purpose of evaluating the relative factual merits of different positions in pending proceedings, disclosure would invite "probing [of] the decision-making process itself."[131] Here, on the other hand, the Commission has cited no specific pending proceeding for which the notes were compiled, and in any event it has presented no evidence that the notes are evaluative in nature rather than straightforward factual narrations.

The Commission argues, however, that the notes "may be used by the staff in making recommendations to the Commissioners concerning future consultative meetings."[132] We have rejected this sort of sweeping argument before. Such an interpretation would "swal-

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[128] *Id.* at 935.

[129] *Id.*

[130] *See, e.g., Lead Indus. Ass'n, Inc.* v. *OSHA*, 610 F.2d 70 (2d Cir. 1979) (summaries of evidence in rulemaking proceedings); *Montrose Chem. Corp.* v. *Train*, 491 F.2d 63 (D.C. Cir. 1974) (summaries of evidence in adjudicatory proceedings).

[131] *Montrose Chem. Corp.* v. *Train*, *supra* note 130, 491 F.2d at 68 ("Whether he weighed the correct factors, whether his judgmental scales were finely adjusted and delicately operated, disappointed litigants may not prove his deliberative process.") (footnote omitted); *see also Lead Indus. Ass'n, Inc.* v. *OSHA*, *supra* note 130, 610 F.2d at 83-84.

[132] DOJ Brief at 33 (quoting Gosse Affidavit ¶ D, *reprinted in* JA at 345).

low up a substantial part of the administrative process" and "would result in a huge mass of [factual] material being forever screened from public view."[133] It is not enough for an agency to assert that factual material "may be used" in future deliberations; the agency must demonstrate that the material at issue is inextricably interwined with a *specific* deliberative proceeding.[134]

Finally, the Commission asserts that these notes are protected by the "related governmental privilege" that protects "information provided to the government by persons who would not provide information unless given a promise of confidentiality."[135] We need not consider the scope of this exemption,[136] however, for the Commission provided no evidence to the district court that confidential treatment had actually been promised to the foreign participants or that the foreigners would not otherwise have met with the Committee to discuss the Commission's competition policy.[137]

IV. The Sunshine Act Count

The Government in the Sunshine Act is grounded on the principle that "the public is entitled to the fullest practicable information regarding the decisionmaking

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[133] *Vaughn* v. *Rosen*, *supra* note 96, 523 F.2d at 1145-46.

[134] The Commission's reliance on *Brinton* v. *Department of State*, *supra* note 96, 636 F.2d 600, is misplaced. The court in that case exempted the disputed memoranda from disclosure even though they did not relate to a specific decision, but the material therein was analytical and recommendatory, not factual.

[135] DOJ Brief at 32.

[136] For its previous application, see, e.g., *Merrill* v. *Federal Open Mkt. Comm.*, 565 F.2d 778, 786 (D.C. Cir. 1977), *vacated on other grounds*, 443 U.S. 340, 99 S.Ct. 2800, 61 (L.Ed.2d 587 (1979); *Brockway* v. *Department of Air Force*, 518 F.2d 1184, 1193 (8th Cir. 1975).

[137] The Commission simply asserts in a conclusory manner that "[t]he prospect of disclosure would, in our view, tend to discourage these candid exchanges...." Records Denial, *supra* note 76, 76 F.C.C.2d at 458. *See also infra* note 179 and accompanying text.

processes of the Federal Government."[138] Accordingly, the Act requires that all meetings of multi-member agencies be open to public observation.[139] Meetings may be closed, however, where they would likely involve the discussion of information protected from disclosure under one or more of ten narrowly defined exemptions.[140]

The sole question presented in this count is whether the consultative process exchanges are "meetings" within the meaning of the Act. On cross-motions for summary judgment, the district court held that they are. We conclude that there are no genuine issues of material fact and we affirm. The public may therefore be excluded from these discussions only in accordance with the Act's stringent closure provisions.

The Sunshine Act defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business."[141] Under the Act, the Commision bears the burden of demonstrating that this definition does not en-

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[138] Government in the Sunshine Act, § 2, Pub. L. No. 94-409, 90 Stat. 1241, 1241 (1976).

[139] 5 U.S.C. § 552b(b) (1976). An "agency" is any agency as defined in FOIA, *id.* § 552(e), that is "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency." *Id.* § 552b(a)(1).

[140] *Id.* § 552b(c)(1)—(10).

[141] *Id.* § 552b(a)(2). The ambiguity of this definition has frequently been noted. *See, e.g.*, R. BERG & S. KLITZMAN, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 3-4 (1978) ("Defining the scope of the term 'meeting' is one of the most troublesome problems in interpreting and applying the Sunshine Act. The definition was revised frequently during the course of the legislative process, sometimes for obscure reasons, and the legislative history is not completely consistent.") (footnote omitted).

compass the CP discussions.[142] It has advanced three arguments, which we consider in turn.

A. *The Authorization Requirement*

To be a meeting covered by the Sunshine Act, a gathering must include "at least the number of individual agency members required to take action on behalf of the agency."[143] This language requires the presence of *either* a quorum of the full agency *or* a quorum of a "subdivision . . . authorized to act on behalf of the agency."[144] Although it is undisputed that a quorum of the Telecommunications Committee attends the CP exchanges, the Commission argues that it has not "authorized" the Committee to "act" on its behalf at the discussions. Because such an authorization could only be accomplished through an express delegation of power pursuant to 47 U.S.C. § 155(d)(1) (1976),[145] the Commission contends, the threshold requirement of an authorized quorum has not been met.

We disagree. The applicability of the Sunshine Act manifestly cannot turn on whether an agency has in fact followed proper procedures for delegating authority to a subdivision, for the requirements of the Act could otherwise be evaded at will. The Commission concedes in the instant case that (1) Committee members

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[142] 5 U.S.C. § 552b(h)(1) (1976).

[143] *Id.* 552b(a)(2).

[144] H.R. REP. No. 880 (Part 1), 94th Cong., 2d Sess. 7 (1976), U.S. Code Cong. & Admin. News 1976, pp. 2183, 2189 [hereinafter cited as "House Report I"]; S. REP. No. 354, 94th Cong., 1st Sess. 17, 19 (1975) [hereinafter cited as "Senate Report"]. *See also* 5 U.S.C. § 552b(a)(1) (1976) ("agency" includes "any subdivision thereof authorized to act on behalf of the agency").

[145] That section provides that "the Commission may, be published rule or by order, delegate any of its functions . . . to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter. . . ." We discuss the delegation question *infra* Part V-C.

attend CP exchanges in their "official roles";[146] (2) their goal is to build a "consensus" that will "lead ultimately to operating agreements for ITT's competitors";[147] and (3) they convey the information and views "exchanged" at the meetings to the full Commission for its consideration.[148] Indeed, the Commission insists in its rulemaking denial that the Committee's participation in the meetings is necessary for the Commission to carry out its statutory duty to regulate international communications.[149] Whatever the actual scope of the Committee's endeavors, there can therefore be no question that they are undertaken "on behalf of" the Commission.

B. *"Conduct or Disposition of Official Agency Business"*

A more difficult question is whether the Committee's efforts are "deliberations [that] determine or result in the joint conduct or disposition of official agency business."[150] The statutory language is ambiguous. "Deliberations" might be read narrowly to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency. On the other hand, "conduct . . . of official agency business" suggests a much broader range of activity, including, *inter alia*, hearings and meetings with outsiders.

The Commission advances three arguments based on the statutory language and the legislative history, in support of the narrow interpretation.

1. *"Official Agency Business"*

The Commission argues that the Committee does not transact "official agency business" at the meetings; members participate solely to "exchange information

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[146] DOJ Brief at 24; *see also supra* notes 23, 37-39, and accompanying text.

[147] *See supra* notes 24-25 and accompanying text.

[148] DOJ Brief at 24; *see also* Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 883.

[149] *See supra* notes 37-39 and accompanying text.

[150] 5 U.S.C. § 552b(a)(2) (1976).

and views," and not to vote, "negotiate," or otherwise engage in a "'rump' FCC meeting."[151] The Reports of the House and Senate Committees on Government Operations, however, clearly demonstrate that "official agency business" encompasses far more than simply "agency actions" of the sort reviewable under the APA.[152] The Senate Report, for example, states that "[i]n addition to business meetings of the agency," the definition of covered meeting "includes *hearings and meetings with the public.*"[153] Similarly, both Reports indicate that subdivisions are covered by the Act where they are "authorized to submit recommendations, . . . or to conduct hearings on behalf of the agency."[154] So long as hearings and meetings with outsiders result in the actual conduct of official business, agencies cannot avoid the openness requirements where they are otherwise subject to the Act.

The Commission has advanced no reason to distinguish the discussions at issue from "hearings" or "meetings with the public." There can be no question, moreover, that the closed discussions involve agency business of the first import. These encounters play an integral role in the Commission's policymaking processes in at least two ways. First, the Commission has emphasized that the meetings are an important means for gathering information and opinions from foreign ad-

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[151] DOJ Brief at 24; *see also* Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 883-84, 886.

[152] *Compare* 5 U.S.C. § 551(13) (1976). *See* House Report I, *supra* note 144, at 8; *see also Pacific Legal Found.* v. *Council on Envtl. Quality*, 636 F.2d 1259, 1264-65 (D.C.Cir. 1980) (formulating and rendering advice to the President is official agency business).

[153] Senate Report, *supra* note 144, at 18 (emphasis added). *See also* H.R. REP. No. 1441 & S.REP. No. 1178, 94th Cong., 2d Sess. 11, U.S.Code Cong. & Admin. News 1976, p. 2183 (1976) (adopting "the Senate definition, as explained in the Senate report") [hereinafter cited as "Conference Report"].

[154] House Report I, *supra* note 144, at 7, U.S. Code Cong. & Admin. News 1976, p. 2189; Senate Report, *supra* note 144, at 17.

ministrations, and that this material is essential in its deliberations regarding the future structure of international telecommunications.[155] The act extends to subdivisions' activities that result in the submission of "recommendations," and we agree with the district court that the Commission has failed to rebut the commonsense presumption that the Committee's activities are, at least in part, evaluative and recommendatory in nature.[156] Second, the success of the Commission's established competition policy depends on its achieving a "consensus" and "favorable climate" with foreign administrations,[157] and the agency has chosen the CP as the vehicle to assist Graphnet and Telenet in obtaining interconnection agreements. The broad sweep of the Sunshine Act does not support a distinction between an agency's *predecisional* activities and its *postdecisional* efforts to implement, interpret, and promote its policies. Both are important components of "official agency business."

2. *Meetings "of" the Agency*

The Commission argues, however, that the CP discussions are not meetings *of* the Committee, but simply meetings attended *by* the Committee. Put another way, the discussions do not involve the "joint" conduct of business *among* Committee members, but rather exchanges *between* the Committee and outside parties.

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[155] *See* Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 883 ("The Consultative Process ... provides a valuable if not indispensable source of information ... because it facilitates our predictive judgment as to future foreign communications needs and the solutions to those needs that will be acceptable to other countries...."); *see also supra* notes 37-39 and accompanying text; sources cited *supra* note 16.

[156] District Court Opinion at 7, *reprinted in* JA at 154. Our conclusion is buttressed by the Commission's contradictory argument in the FOIA count that documents generated from the meetings are predecisional materials. *See supra* notes 122, 126, 132, and accompanying text.

[157] *See supra* notes 24-25 and accompanying text.

Again, this argument fails to overcome the presumption that agency hearings and meetings with outsiders be open to public observation. An agency cannot avoid this requirement through the facile expedient of having an outside party "hold" the discussion, for the Sunshine Act's policy that hearings and meetings with the public be open could otherwise be ignored with impunity.[158]

Moreover, the intended meaning of the phrase "joint conduct" offers the Commission little comfort. The House Report emphasizes that the phrase "does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business."[159] Rather, the phrase was intended to exempt solely those situations "where the requisite number of members is physically present in one place but not conducting agency business as a body."[160] Both the House and Senate Reports cite as an example a gathering where one member gives a speech concerning agency business while other members are in the audience.[161] The instant situation is readily distinguishable. The full Committee meets with its foreign counterparts, and the record shows that all members are active participants in the give-and-take.[162]

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[158] The Senate Report emphasizes that "the mere setting of the gathering is not determinative .... [M]eetings outside the agency are equally subject to the bill if they discuss agency business and otherwise meet the requirements of this subsection. The test is what the discussion involves, not where or how it is conducted." Senate Report, *supra* note 144, at 18-19.

[159] House Report I, *supra* note 144, at 8, U.S. Code Cong. & Admin. News 1976, p. 2190.

[160] *Id.*; *see also* Senate Report, *supra* note 144, at 18.

[161] House Report I, *supra* note 144, at 8; Senate Report, *supra* note 144, at 18. The Senate Report states that the phrase "also excludes instances where a single agency head, authorized to conduct a meeting on behalf of the agency, or to take action on behalf of the agency, meets with members of the public, or staff." Senate Report, *supra* note 144, at 18.

[162] We note in passing that the Commission's Sunshine Act regulations define a "meeting" as "the deliberations *among* a quorum of the Commission, a Board of Commissioners, or a quo-

3. *"Informal Background Discussions"*

The Commission relies heavily on a statement in the Senate Report that "[i]t is not the intent of the bill to prevent any two agency members, regardles [*sic*] of agency size, from engaging in informal background discussions which clarify issues and expose varying views."[163] The Commission contends that the CP meetings are precisely the sort of discussions that Congress intended to exclude by this language. We conclude that this passage from the Senate Report, read in context, does not support the Commission's position.

The definition of a "meeting" was recurrently revised during the course of the legislative process.[164] Many members of Congress, both supporters and opponents of the Act, were particularly concerned that the evolving definition might mechanically be extended to informal discussions among members that did not truly constitute the "conduct" of agency business. Examples cited included passing references to agency business at social gatherings,[165] casual background conversations in

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rum of a committee of Commissioners." 47 C.F.R. § 0.601(b) (1981) (emphasis added). To the extent that the word "among" may be designed to exempt hearings on meetings with the public that result in the conduct of official agency business, its use violates Congress's intent. *See supra* notes 151-61 and accompanying text.

[163] Senate Report, *supra* note 144, at 19. The reference is to informal discussions between two members of a three-member agency; the passage "necessarily has broader application," exempting such discussions among a quorum of members, regardless of agency size. R. BERG & S. KLITZMAN, *supra* note 141, at 6.

[164] See Appendix C of R. BERG. & S. KLITZMAN, *supra* note 141, at 116-17, for a chronological chart of the evolving definition of "meeting."

[165] House Report I, *supra* note 144, at 35 (additional views of Rep. Horton); H.R.REP. No. 880 (Part 2), 94th Cong., 2d Sess. 38 (1976) (additional views of Reps. Moorhead & Kindness) [hereinafter cited as "House Report II"]; 122 CONG.REC. 24,183 (1976) (remarks of Rep. Horton); *id.* at 24,188-89 (remarks of Rep. McCloskey).

offices and corridors,[166] banter on the golf course,[167] and breakfast or luncheon discussions among members about the day's business.[168]

Although many legislators felt that the phrase "conduct ... of official agency business" by *definition* excludes such encounters,[169] the language cited by the Commission was inserted into the Senate Report to ensure that discussions of this sort were not construed as actual meetings. The Report emphasizes that the line between these kinds of informal encounters and those amounting to the actual conduct or disposition of agency business is fine, and it reiterates that the Act's presumption of openness requires that all doubts be resolved against closure.[170].

The thrust of the language in the Senate Report therefore concerns "informal background discussions" *among* agency members rather than *between* members and outsiders.[171] Although we believe that the Sun-

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[166] 122 CONG.REC. 24,189-90 (1976) (remarks of Rep. McCloskey); *id.* at 24,193 (remarks of Rep. Ashley).

[167] *Id.* at 24,189 (remarks of Rep.McCloskey); *id.* at 24,203 (remarks of Rep. Horton).

[168] *Id.* at 24,203 (remarks of Rep. McCloskey).

[169] *See, e.g., id.* at 24,193 (remarks of Rep. Collins); *id.* at 24,203 (remarks of Rep. Brooks); *id.* at 24,204 (remarks of Rep. Abzug); *id.* (remarks of Rep. Flowers).

[170] Senate Report, *supra* note 144, at 19.

[171] *See also* R. BERG & S. KLITZMAN, *supra* note 141, at 8 (Senate Report's language excludes "briefings to" and "exploratory talks *among* agency members") (emphasis added); *id.* at 8 n. 13 (citing agency regulations). The Department of Justice has in the past interpreted "meeting" to include "a 'briefing session' attended by at least the number of agency members required to take action on behalf of the agency, where the members attending have an opportunity to ask questions or seek clarification of matters of concern." Department of Justice Letter to Covered Agencies (Apr. 19, 1977), *reprinted in* R. BERG & S.KLITZMAN, *supra* note 141, at 120-21 (Appendix E).

The Conference Committee's substitution of the phrase "determine or result in" for the word "concern," *see* Conference Report, *supra* note 153, at 11, also supports this reading. *See* 122 CONG. REC. 28,474 (1976) (remarks of Rep. Fascell) ("This

shine Act does not *per se* forbid all informal off-the-record discussions between a quorum of an agency and outside parties, we conclude that an agency's burden of persuasion must be especially great in such situations. Congress intended that "hearings" and "meetings with the public" be open; many such gatherings could easily be characterized as "informal background discussions which clarify issues and expose varying views." If we did not apply the narrowest of interpretations to this language, it would readily swallow up the requirement of open "hearings" and "meetings with the public."

In the instant case, the Commission has failed to overcome the presumption in favor of openness. The CP discussions are not "chance meetings," "social gatherings," or "informal discussions" among members,[172] but prearranged conferences held to effectuate public business of the greatest import. They focus on concrete issues and are conducted to build a "consensus" that will have far-reaching effects on the structure of the communications industry. They are, in short, an integral part of the Commission's policymaking processes, and as such they constitute the "conduct ... of official agency business."

C. *Policy Arguments*

The Commission invokes a number of "adverse practical consequences" that would allegedly result from extending the Sunshine Act to the consultative process.[173]

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language is intended to permit casual discussions *between agency members* that might invoke the bill's requirements under the less formal 'concern' standard.") (emphasis added).

[172] *See* 122 CONG. REC. 24,204 (1976) (remarks of Rep. Abzug); *supra* notes 165-68, 171, and accompanying text.

[173] The Commission argues, for example, that it initiated the [illegible]ed meetings "because [we] recognized the need for a neutral forum for talks which did not create the impression that the Europeans were subject to U.S. regulatory processes." FCC Brief at 30 n. 24. Affirmance of the district court's judgment, the Commission warns, "would be inconsistent with the desired impression." *Id. See also* DOJ Brief at 25-26; Demory Affidavit ¶ 8

These difficulties, the Commission argues, demonstrate that—"at least in the absence of a clear statement by Congress"—the Act should not be interpreted to cover meetings between an agency and its foreign counterparts.[174]

The absence of a clear statement by Congress, however, cuts in the other direction.[175] The Sunshine Act's presumption in favor of open meetings is sweeping and, with the exception of enumerated exemptions, unqualified. The Commission points to nothing in the history or structure of the Act to indicate that Congress intended *sub silentio* to permit the closure of agency meetings simply because foreign representatives are present.

Moreover, the Act permits agencies to close meetings that likely would involve the discussion of information exempted from disclosure under 5 U.S.C. § 552b(c) (1976); the district court specifically invited the Commission to take advantage of this provision. For example, section 552b(c)(9) permits an agency to close meetings involving "information the premature disclosure of which would ... be likely to frustrate implementation of a proposed agency action." Similarly, section 552b(c)(1) permits closure where discussions would involve national defense or foreign policy information that is exempt "under criteria established by an Executive order."[176] Thus, Congress fully recognized that certain meetings should not be open to public scrutiny. As we have emphasized, however, "[t]he means Congress chose to accomplish this objective, ... was to permit an agency to close a *particular* meeting on an

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("The Europeans appreciate the opportunity to communicate with us directly and prefer this to [discussions] through diplomatic channels. In my opinion, the District Court's order will limit this direct contact and will have a decidedly negative impact on our relations with foreign administrations."), *reprinted in* DOJ Brief at 4a.

[174] DOJ Brief at 26.

[175] *See, e.g.*, 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.23-.25 (4th ed. 1973 & 1982 Cum.Supp.).

[176] We express no views as to whether either of these exemptions could properly be invoked to close the CP discussions.

individual basis because of the adverse impact public proceedings would be likely to have upon the rights of individuals and the ability of the government to function properly."[177] Rather than acting upon an "individual and particularized basis,"[178] the Commission has sought to exempt an entire category of its business from the requirements of the Sunshine Act. We therefore reject the Commission's restrictive interpretation of "meetings" covered by the Act.[179]

V. The Rulemaking Denial

We turn finally to the Commission's order denying ITT's petition for rulemaking. Our scope of review is defined by 5 U.S.C. § 706(2) (1976), which requires

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[177] *Pacific Legal Found.* v. *Council on Envtl. Quality*, *supra* note 152, 636 F.2d at 1265.

[178] *Id.*

[179] The Commission on appeal has relied heavily on the Lee and Demory affidavits, *see supra* notes 19, 25, in support of its characterization of the closed CP sessions. Neither affidavit was submitted until after the district court had rendered its decision. We look with great disfavor on such *post hoc* attempts to supplement the record. *See, e.g.*, *Coastal States Gas Corp.* v. *Department of Energy*, *supra* note 96, 617 F.2d at 859 n.6. In any event, the affidavits are vague, conclusory, and contradictory. Lee's affidavit, for example, largely parrots the language of the statute and legislative history. *See* Lee Affidavit ¶ 3 (Lee did not "take any action on behalf of the Commission," "submit ... recommendations," or "conduct any hearings at such meetings on behalf of the agency"), *reprinted in* JA 587-88. Lee's assertions also flatly contradict the Commision's conceded purpose for holding the meetings. *Compare id.* (Lee did not "seek to have the participants ... agree to ... take any specific actions regarding any particular telecommunications policies"), *reprinted in* JA at 588, *with supra* notes 24-25 and accompanying text. Similarly, Demory's affidavit alleges in conclusory terms that the CP meetings "must be off the record" if they are "to be truly useful in providing a vigorous exchange of views." Demory Affidavit ¶ 5, *reprinted in* DOJ Brief at 3a. In line with FOIA decisions, we believe that such conclusory affidavits, even if properly considered at this juncture, are wholly inadequate to sustain the Commission's burden of proof. *See Coastal States Gas Corp.* v. *Department of Energy*, *supra* note 96, 617 F.2d at 861.

that we "hold unlawful and set aside agency action, findings, and conclusions found to be," *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[180]

We have noted that the arbitrary and capricious standard is not "a fixed template to be imposed mechanically on every case,"[181] but instead requires calibration in accordance with the nature and context of the challenged action. Where an agency promulgates rules, our standard of review is "diffident and deferential,"[182] but nevertheless requires a "searching and careful" examination of the administrative record to ensure that the agency has fairly considered the issues and arrived at a rational result.[183] Where, as here, an agency chooses *not* to engage in rulemaking, our level of scrutiny is even more deferential: "It is only the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment, not to institute rulemaking"[184] This added measure of deference, however, is appropriate only where the rejected proposal is addressed to matters within the agency's broad policy discretion.[185] Where a rulemaking petition

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[180] 5 U.S.C. § 706(2)(A) (1976). *See also id.* § 706(2)(C)-(D) (reviewing court must set aside agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law").

[181] *Natural Resources Defense Council, Inc.* v. *SEC*, *supra* note 67, 606 F.2d at 1049.

[182] *Id.* (footnote omitted).

[183] *Citizens, to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971). *See generally Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 34-36 (D.C.Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 392-94 (D.C.Cir. 1973), *cert. denied*, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974).

[184] *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 818 (D.C.Cir. 1981).

[185] *See, e.g., id.* at 819-20 (denial of rulemaking petition *re* regulation of local subscription television stations); *Natural Resources Defense Council, Inc.* v. *SEC*, *supra* note 67, 606 F.2d at 1046, 1049, 1053 (same *re* corporate disclosure of environ-

challenges an agency's compliance with substantive and procedural norms, on the other hand, our standard of review must perforce be "exacting" to ensure that the agency has "scrupulously" followed the law.[186]

ITT's rulemaking petition involves both issues of discretion and questions of compliance with statutory and procedural commands. The Commission has considerable discretion, beyond the statutory minima, in fashioning rules for public participation in its processes.[187] Some of ITT's proposals go well beyond minimum statutory requirements, and the Commission might reasonably conclude that they are cumbersome and counterproductive.[188] On the other hand, many of the issues presented in the rulemaking petition call into question the Commission's compliance with the Communications Act, the APA, and the Sunshine Act. Our review of its disposition of these issues must be "thor-

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mental and equal employment policies); *Action for Children's Television* v. *FCC*, 564 F.2d 458, 479-80 (D.C.Cir. 1977) (same *re* television programming for children).

[186] *Natural Resources Defense Council, Inc.* v. *SEC*, *supra* note 67, 606 F.2d at 1048, 1053 (agency compliance with National Environmental Policy Act); *see also Geller* v. *FCC*, 610 F.2d 973, 978-80 (D.C.Cir. 1979) (per curiam) (agency refusal to consider effect of new legislation on earlier regulations); *NAACP* v. *FPC*, 520 F.2d 432, 435-46 (D.C.Cir. 1975) (agency jurisdiction), *aff'd*, 425 U.S. 662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976); *National Org. for Reform of Marijuana Laws (NORML)* v. *Ingersoll*, 497 F.2d 654, 659 (D.C.Cir. 1974) (scope of agency authority).

[187] *See, e.g., Vermont Yankee Nuclear Power Corp., Inc.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-48, 98 S.Ct. 1197, 1211-13, 55 L.Ed.2d 460 (1978); *American Trucking Ass'ns* v. *United States*, 627 F.2d 1313, 1321 (D.C.Cir. 1980).

[188] The Commission so argues on appeal, *see* FCC Brief at 26-27, but the proposal's "unworkability" did not form the basis for the Commission's rulemaking denial. *See* Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 887-88. Indeed, the Commission seems to have believed that the proposals are generally sound, for it promised to follow most of them, albeit without the adoption of formal regulations, in future CP meetings. *Id.* at 888.

ough, probing, [and] in-depth";[189] the Commission's explanation and the evidence it marshalls "must be such as to enable [us] to determine with some measure of confidence whether or not the [actions are] arbitrary [or] capricious."[190]

Applying these standards, we reverse the Commission's rulemaking denial in part, and remand the remaining issues for further consideration in accordance with our discussion below.

A. *The Sunshine Act*

For the reasons set forth in Part IV, the CP discussions are "meetings" within the meaning of the Sunshine Act, and are therefore governed by the Act's stringent closure provisions. In its rulemaking denial, however, the Commission concluded that these exchanges fall outside of the Sunshine Act's ambit.[191] This determination is not in accordance with law, and we therefore reverse this part of the Commission's order.

B. *The Commission's Authority*

The Commission's assessment of the scope of its authority deserves deference.[192] Before we can sanction the Commission's course of conduct, however, we must ascertain the nature of its actions, its reasons for the actions, and whether those actions comport with the Communications Act and the APA.[193] The Commission's explanations and the "record" it has assembled are patently inadequate for such a determination.[194]

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[189] *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra* note 183, 401 U.S. at 415, 91 S.Ct. at 823.

[190] *Dunlop* v. *Bachowski*, 421 U.S. 560, 571, 95 S.Ct. 1851, 1859, 44 L.Ed.2d 377 (1975) (citation omitted).

[191] *See supra* notes 40-41 and accompanying text.

[192] *See Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969).

[193] *See, e.g., Dunlop* v. *Bachowski*, *supra* note 190, 421 U.S. at 571, 95 S.Ct. at 1859; *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra* note 183, 401 U.S. at 419-20, 91 S.Ct. at 825; cases cited *supra* note 186.

[194] "Record" is something of a misnomer, as the Commission chose not to conduct rulemaking. The "record" here consists

We are asked, in essence, to approve of actions about which we know almost nothing. The record consists simply of the Commission's assertions that it has not negotiated, and of numerous statements by agency members that would appear to undercut these assertions. Self-serving representations are no substitute for an adequate record that would enable us to determine with confidence the actual scope of the Commission's endeavors. By refusing to develop any such record of its contacts with foreign administrations, the Commission has frustrated meaningful judicial review of its rulemaking denial.[195]

The Commission argues, however, that no record is required because (1) no one is prejudiced by the informal, off-the-record meetings, and (2) no reviewable "agency action" occurs at the meetings. This argument must be rejected. ITT has pointed to a number of factors that raise serious questions about the Commission's claim that no "agency action" occurs in connection with the consultative process.[196] This court certainly has authority to determine whether activities engaged in by the Commission are subject to judicial review; the circular claim that these activities are unreviewable makes such a determination impossible.

In addition to the paucity of the record, several additional "danger signals" suggest that the Commission may not have engaged in "reasoned decision-making" in its rulemaking denial.[197] First, ITT pointed to a num-

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simply of the petition, comments, and denial. The Commission has argued, however, that "[t]his case has an administrative record more than amply detailed enough to permit this Court to review the agency decision in a routine manner." DOJ Brief at 14.

[195] *See, e.g., Camp* v. *Pitts*, 411 U.S. 138, 142-43, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973); *United States Lines, Inc.* v. *Federal Maritime Comm'n*, 584 F.2d 519, 532-33 (D.C.Cir. 1978); *Moss* v. *CAB*, *supra* note 66, 430 F.2d at 900.

[196] *See supra* notes 22-26, 66, and accompanying text.

[197] *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 (D.C.Cir. 1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971).

ber of statements by agency officials that would appear to contradict the Commission's characterization of the CP meetings as mere "information exchanges."[198] In its order, however, the Commission failed completely to acknowledge these statements or to explain the apparent contradictions.[199] Second, the Commission dismissed ITT's *ex parte* and prejudgment claims as "theoretical" and "speculative, for in the absence of a pending proceeding, be it formal or informal, [such] questions ... simply do not exist."[200] Reference to the Commission's FOIA materials, however, suggests that a number of pending docket proceedings have in fact been discussed at the CP meetings.[201] Finally, there is evidence suggesting that the rulemaking denial was crafted in part to enhance the Commissioner's litigation posture in the district court action.[202]

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[198] *See, e.g.*, Rulemaking Petition at 5, *reprinted in* JA at 20; Reply Comments of ITT World Communications, Inc., at 3-4 (Jan. 8, 1980) *reprinted in* JA at 118-19. *See also supra* notes 22-26 and accompanying text.

[199] *See, e.g., Home Box Office, Inc.* v. *FCC*, *supra*, note 183, 567 F.2d at 35-36 & n. 58; *Portland Cement Ass'n* v. *Ruckelshaus*, *supra* note 183, 486 F.2d at 393-94.

[200] Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 887-88.

[201] *See* Records Denial, *supra* note 76, Attachment II, 76 F.C.C.2d at 460 (items 5, 7, 8 and 10); Frisby Affidavit ¶ 3, *reprinted in* JA at 340-41. *See also* Rulemaking Petition at 9-10 (listing open docket proceedings), *reprinted in* JA at 24-25.

[202] *See Transcript of FCC Open Meeting*, at 1 (Apr. 22, 1980) (remarks of David Bass concerning preliminary draft of rulemaking denial) ("We do have some changes to make in the draft before you now both on our undertaking and at the suggestion of the General Counsel's Office to strike from this order and help it coordinate with the collateral court suit that ITT has filed in the District Court...."), *reprinted in* JA at 135. See also the colloquy between Commissioner Abbott Washburn and General Counsel Robert Bruce, *id.* at 6, *reprinted in* JA at 140:

> Washburn: Why do we have to address this here, Mr.Chairman. Why can't we get at it in some other context. Let's get rid of this tiem [*sic*] without addressing this matter at this point.
>
> Bruce: Commissioner Washburn, I think it's probably useful that we deal with this petition at this time because of the pending litigation in the District Court.

On the basis of the Commission's statement and the record before us, we therefore cannot sustain the Commission's characterization of its actions, its conclusion that these actions are authorized, or its rejection of *all* APA safeguards. We must therefore remand the order to the Commission.

Our normal course would simply be to instruct the Commission to consider the issues further and develop an adequate record for judicial review.[203] In the instant case, however, we also have a district court action that is simultaneously being remanded for *de novo* proceedings on the *ultra vires* issue.[204] To the extent that there is tension in such a "double remand," it is largely of the Commission's own making. As discussed in Part II-A, the issues raised by the *ultra vires* count are distinct from those presented in the rulemaking denial.[205] District court scrutiny, moreover, is appropriate in large measure because the consultative process has taken place outside of normal administrative channels, thereby necessitating *de novo* factfinding.[206] At the same time, the necessity for district court intervention does not lessen the degree of scrutiny we apply to the Commission's rulemaking denial,[207] and in no way excuses the Commission's failure to generate a contemporaneous administrative record of the consultative process.[208]

Nevertheless, we are concerned that the practical effect of our decision is fraught with the potential for duplication, conflicting resolutions, and further delay. The Commission may avoid these difficulties through the simple expedient of staying further action on ITT's

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[203] *See, e.g., Camp* v. *Pitts, supra* note 195, 411 U.S. at 143, 93 S.Ct. at 1244; *United States Lines, Inc.* v. *Federal Maritime Comm'n, supra* note 195, 584 F.2d at 532-33; *Greater Boston Television Corp.* v. *FCC, supra* note 197, 444 F.2d at 850.

[204] *See supra* Part II-A.

[205] *See supra* notes 50-51 and accompanying text.

[206] *See supra* notes 52-54 and accompanying text.

[207] *See supra* notes 181-90, 192-202, and accompanying text.

[208] *See Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra* note 183, 401 U.S. at 420, 91 S.Ct. at 825.

rulemaking petition pending the district court's resolution of the *ultra vires* issue. If the district court determines that the Commission may not engage in the consultative process, the question of rulemaking will become moot. If the Commission's actions are upheld in part or in whole, the Commission can then consider afresh the extent to which rulemaking may be appropriate, informed by the district court's resolution and guided by the considerations we have set forth today.

C. *Delegation of Authority to the Telecommunications Committee*

The Commission may delegate its authority to subdivisions or individual members, but such delegation must be accomplished "by published rule or by order."[209] The Commission has delegated power to the Committee to act upon certain common carrier applications and requests.[210] Its published rule, however, provides no explicit authorization to the Committee to engage in the consultative process.

If the Commission argued that the CP exchanges were important to the Committee's discharge of its delegated responsibilities, we might well conclude that no explicit authorization to participate was necessary. Interaction with the public is the "bread-and-butter" of government administration;[211] dialogues with its foreign counterparts might reasonably be characterized as necessary and proper to the efficient transaction of the Committee's business.[212] In the instant case, however,

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[209] 47 U.S.C. § 153(d)(1) (1976). *See supra* note 145.

[210] Specifically, the Committee is authorized to act upon all section 214 and 319 common carrier applications, where the cost of construction or value of the facilities exceeds $10 million. 47 C.F.R. § 0.215 (1981).

[211] *See, e.g., Home Box Office Inc.* v. *FCC*, *supra* note 183, 567 F.2d at 57; *see also Association of Nat'l Advertisers, Inc.* v. *FTC*, 627 F.2d 1151, 1169 (D.C.Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980).

[212] *See* 47 C.F.R. § 0.204(a) (1981) ("Any official (or group of officials) to whom authority is delegated in this subpart is authorized to issue orders . . . pursuant to such authority *and to*

the Commission adamantly maintains that the Committee's functions are *strictly* limited to its delegated responsibilities, that the CP meetings do *not* relate to these responsibilities, and that the Committee itself has *no* authority to act on the Commission's behalf at the meetings.[213] The Commission characterizes the Committee members' attendance as pursuant to their personal capacities: "The authority to meet with foreign entities is not something for which delegation is required since any commissioner given the nature of his regulatory responsibilities, has the right—indeed, the responsibility—to meet with the public to educate himself regarding the issues."[214]

This argument easily fails. The Commission concedes elsewhere that the commissioners attend the meetings in their official capacities and *qua* the Telecommunications Committee, and the record amply shows that the Committee acts on the Commission's behalf in seeking to effectuate official agency business.[215] Taking the Commission at its word that the Committee's delegated authority does not encompass such endeavors, we direct that, so long as the Committee continues to play this role in the consultative process, it do so only pursuant to a proper and precise delegation of authority from the Commission.

CONCLUSION

To summarize our decision:

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enter into general correspondence concerning any matter for which he is responsible under this subpart....") (emphasis added). We intimate no views on the proper scope of such dialogues.

[213] *See* Rulemaking Denial, *supra* note 7, 77 F.C.C.2d at 886 & n. 10, FCC Brief at 15; DOJ Brief at 23 & n. 10, FCC District Court Memorandum at 23 ("The only type of business the Telecommunications Committee may engage in, the consideration of common carrier applications, does not arise at these conferences."), *reprinted in* JA at 513.

[214] FCC Brief at 32 n. 26.

[215] *See supra* notes 22-26, 146-49, 155-57, and accompanying text.

First, with respect to the *ultra vires* count, we conclude that (a) the district court has subject matter jurisdiction, (b) ITT has standing, and (c) the controversy is ripe for adjudication. We therefore reverse the judgment of the district court dismissing that count and remand for further proceedings.

Second, we affirm the district court's judgment ordering disclosure under FOIA of items 1 and 7. We reverse with respect to item 2. As to the other documents contested in this litigation, we reverse and remand to the district court for further consideration and findings.

Third, we affirm the district court's judgment that the CP discussions are "meetings" within the meaning of the Sunshine Act. The public may therefore be excluded from these discussions only in accordance with the Act's stringent closure provisions.

Finally, we (a) reverse that part of the commission's rulemaking denial concluding that the Sunshine Act does not encompass the meetings at issue, and (b) remand the remainder of the order to the Commission for further action in accordance with our opinion.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1982

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

SOUTHERN PACIFIC COMMUNICATIONS COMPANY, RCA GLOBAL COMMUNICATIONS, INC., INTERVENORS

No. 80-2324
Civil Action No. 80-00428

ITT WORLD COMMUNICATIONS, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

No 80-2401
Civil Action No. 80-00428

ITT WORLD COMMUNICATIONS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Petition for Review of an Order
of the Federal Communications Commission

Appeal from the United States District Court
for the District of Columbia

Before: TAMM and MIKVA, Circuit Judges and BAZELON, Senior Circuit Judge

JUDGMENT
Filed Feb. 1, 1983

These causes came on to be heard on a petition for review of an order of the Federal Communications Commission and the records on appeal from the United States District Court for the District of Columbia, and

were argued by counsel. On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the order of the Federal Communications Commission and the judgment of the District Court appealed from in these causes are hereby affirmed in part and reversed in part, and these cases are remanded, in part, to the Commission and to the District Court, respectively, for further proceedings, all in accordance with the opinion of this Court filed herein this date.

Per curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: February 1, 1983.
Opinion for the Court filed by Senior Circuit Judge Bazelon

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1982

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

SOUTHERN PACIFIC COMMUNICATIONS COMPANY, RCA GLOBAL COMMUNICATIONS, INC., INTERVENORS

AND CONSOLIDATED CASES

BEFORE: TAMM and MIKVA, Circuit Judges and BAZELON, Senior Circuit Judge

ORDER

Filed Apr. 6, 1983
Argued Apr. 16, 1982

On consideration of respondent's petition for rehearing, filed March 18, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
FOR THE COURT:

George A. Fisher,
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1982

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS
SOUTHERN PACIFIC COMMUNICATIONS COMPANY,
RCA GLOBAL COMMUNICATIONS, INC., INTERVENORS

AND CONSOLIDATED CASES

BEFORE: ROBINSON, Chief Judge; WRIGHT, TAMM, MACKINNON, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK and SCALIA, Circuit Judges

ORDER
Filed Apr. 6, 1983
Argued Apr. 16, 1982

Respondent's suggestion for rehearing en banc has been circulated to the full Court and a majority of the Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT:
George A. Fisher, Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing *en banc*.

Circuit Judge Wald did not participate in the foregoing order.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

ORDER
Filed Oct. 17, 1980

It is by the Court this 17th day of October, 1980,

ORDERED, that Defendant's Motion to Dismiss Count I of Plaintiff's Complaint be and hereby is GRANTED; and it is

FURTHER ORDERED, Plaintiff's Motion for Summary Judgment on Counts II and III be and hereby is GRANTED; and it is

FURTHER ORDERED, that Defendant shall disclose to Plaintiff all documents requested herein within ten (10) days of this Order; and it is

FURTHER ORDERED, that Defendant shall comply with the Government in the Sunshine Act, 5 U.S.C. § 552b, consistent with the Memorandum Opinion issued this date FORTHWITH; and it is

FURTHER ORDERED, that Plaintiff shall file its Motion for Attorneys' Fees within thirty (30) days from the date of this Order.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

MEMORANDUM OPINION
Filed Oct. 17, 1980

Before the Court are Defendant's Motion to Dismiss or for Summary Judgment and Plaintiff's Motion for Summary Judgment in the above captioned action. Plaintiff is an international telecommunications carrier. Defendant is the Federal agency charged with regulating, inter alia, foreign commerce in communication. 47 U.S.C. § 151. Plaintiff alleges that (1) certain actions by the Federal Communications Commission (FCC) are ultra vires and must be enjoined, (2) certain documents were wrongfully withheld pursuant to Exemption 5 of the Freedom of Information Act (FOIA) 5 U.S.C. § 552(b)(5) and must therefore be disclosed, and (3) closed meetings have been held in violation of the Government in the Sunshine Act (SA), and all future meetings must be open to the public. The facts in the instant litigation may be summarized as follows:

During the past six years the FCC has engaged in what is known as the Consultative Process (CP). According to the FCC, the CP is a useful means of obtaining information about plans and priorities "without subjecting them to U.S. regulatory jurisdiction in fact or in appearance." AT&T Co. (TAT-7) 73 FCC 2d. 248, 254-255 (1979). For most of the past six years, the FCC, foreign communications entities,[1] and private in-

[1] In most instances, the foreign communications entities are branches of foreign governments.

ternational telecommunications carriers such as Plaintiff have attended CP meetings.

Recently, the private carriers have been excluded from CP meetings. They were not invited to a conference in Dublin, Ireland, held on October 9, 1979, in which, according to the FCC, "a preliminary discussion was held between the Commission representatives and the foreign entities regarding new service and new carriers in the international telecommunications field." Plaintiffs have been excluded from two subsequent meetings, and more private meetings are planned.

On October 12, 1979, Plaintiff filed a FOIA request seeking all documents relating to the October 9th meeting in Dublin. On October 24, 1979, Plaintiff filed a Petition for Rulemaking with the FCC, proposing that the FCC state that (1) it would not negotiate with foreign communications entities at the CP meetings, (2) no action taken at these meetings would be binding on the FCC, (3) notice of the meetings would be given to private carriers, and said carriers would be given the opportunity to submit comments about the proposed topics, and (4) the meetings would be open to the private carriers.

On November 15, 1979, Plaintiff's FOIA request was denied in part. On February 12, 1980, this action was commenced. On April 24, 1980, the FCC denied Plaintiff's rulemaking request. In that denial, the FCC established procedures for the CP, indicating that (1) it would give advance notice of the time, place, participants, and topics of CP meetings, (2) interested parties could submit written comments on suggested additional topics, problems to be considered, and any other germane items, (3) the FCC would provide oral briefing to interested parties prior to CP meetings, and (4) CP meetings would be open unless circumstances required otherwise.

COUNT I

In Count I, Plaintiff alleges that (1) the FCC is seeking to increase competition among carriers in the inter-

national telecommunications market; (2) the FCC licensed two carriers prior to their making appropriate arrangements with foreign communications entities, and this was never heretofore done; (3) the foreign entities have refrained from making appropriate arrangements with the two new carriers because (a) the new carriers have little to offer the foreign entities in terms of programming and (b) the foreign entities do not want to support competition; (4) the FCC is attempting to force the foreign entities to accept the new carriers in order to enhance competition, and (5) the FCC is therefore negotiating with foreign governments. For the purpose of Defendant's Motion to Dismiss Count I, these allegations must be accepted as true. Based on the above assertions, Plaintiff contends that (1) such negotiations are in contravention of the Logan Act, 18 U.S.C. § 953, which states that negotiations with foreign governments are exclusively within the province of the State Department, (2) negotiating with the foreign entities clearly exceeds the FCC's authority, and (3) it is therefore *ultra vires*, and must be enjoined.

Prior to adjudication of Count I on the merits, Plaintiff must surmount three procedural hurdles, to wit: (1) does this court have subject matter jurisdiction over the claim, (2) does Plaintiff have standing, and (3) is the claim ripe for adjudication? Jurisdiction over appeals from FCC orders rests exclusively in the Court of Appeals. 47 U.S.C. § 402(a). Since Plaintiff sought essentially the same relief in a rulemaking proceeding that it seeks here, Defendant contends that subject matter jurisdiction rests in the Court of Appeals. Plaintiff alleges, however, that while the relief sought is similar, it is not appealing the FCC's order. Rather, Plaintiff asserts that the FCC conduct is *ultra vires*, and jurisdiction therefore rests in the District Court.

This Court has jurisdiction over agency action only if the action was "patently *ultra vires*." *Association of Natl. Advertisers* v. *FTC*, 617 F.2d 611, 626 (D.C. Cir. 1979) (Wright, C.J., concurring). This Court seriously doubts that Plaintiff could meet this standard. Because

it is clear that Plaintiff cannot prevail on the standing and ripeness issues, this Court need not address the jurisdictional question. *See Philbrook* v. *Glodgett*, 421 U.S. 707, 721 (1975).

For Plaintiff to have standing in the instant case, it must show that it "suffered a distinct and palpable injury." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). Plaintiff's claim is procedural in nature. It does not question Defendant's authority to regulate foreign commerce in communication and provide for greater competition in that field, nor is there any basis for doing so. *See* 47 U.S.C. § 151 *et seq.* It only claims that Defendant cannot, as a condition precedent to effectuating its policies, negotiate with the foreign entities, because to do so would violate 18 U.S.C. § 953. The Logan Act is a criminal statute which does not bespeak a private right of action. Moreover, the only entity aggrieved by the alleged *ultra vires* conduct is the Department of State, which is not a party in the instant litigation. Assuming *arguendo* that the FCC is engaged in *ultra vires* activity by negotiating with foreign entities, Plaintiff has not shown how this conduct in and of itself has caused it to suffer a cognizable injury. Under *Warth* v. *Seldin* and its progeny, Plaintiff lacks standing to raise Count I.

Assuming however, that Plaintiff surmounts the standing barrier, this case is not ripe for adjudication. The two new carriers have not yet been accepted by the foreign entities. When and if they are so accepted, Plaintiff can object through the formal rulemaking process, and derive relief if its claim is cognizable and meritorious. *See Assn. of Natl. Advertisers* v. *FTC*, 617 F.2d at 620-622 and 625-628 (Wright, C.J., concurring). Count I must be dismissed.

COUNT II

In Count II, Plaintiff seeks documents relating to the closed Dublin meeting and communications involving FCC representatives concerning operating agreements between the new carriers and foreign entities. Defendant relies exclusively on Exemption 5 for its failure to

disclose the requested materials. Exemption 5 permits the non-disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 thus protects from disclosure agency records which are "predecisional and deliberative." *Mead Data Central, Inc.* v. *USAF*, 575 F.2d 932 (D.C. Cir. 1978). This two pronged test requires disclosure unless the materials are both "predecisional" and "deliberative." *Jordan* v. *U.S.*, 591 F.2d 753, 774 (D.C. Cir. 1978).[2]

For documents to be considered "predecisional," they must relate to specific policy. If they are not part of a clear process leading to a final decision on a given issue, they are less likely to be characterized as "predecisional." *Coastal States Gas Co.* v. *DOE*, 617 F.2d 854, 868 (D.C. Cir 1980). In such a case, there is an "additional burden on the agency to substantiate its claim of privilege." *Id. See also Vaughn* v. *Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975).

In the instant case, the FCC cites no specific policy or process in order to protect the documents in question. In fact, they consistently defend the Consultative Process as a means of receiving information without having to formulate policy or utilize United States regulatory jurisdiction. *AT&T Co. (TAT-7)*, 73 FCC 2d. at 255. Upholding the use of Exemption 5 in the instant case "would go a long way toward undercutting the entire Freedom of Information Act," *Vaughn* v. *Rosen*, 523 F.2d at 1146, and detract from the Act's dominant objective of disclosure. *USAF* v. *Rose*, 425 U.S. 352, 360-362 (1976). The documents at issue herein must be disclosed.

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[2] Defendant also claims that the attorney-client privilege, as embodied in Exemption 5, precludes disclosure. This assertion is without merit. That privilege only attaches when an attorney is performing a service that only an attorney can perform, and the communications between attorney and client are made in confidence. Neither showing has been made here. The attorney-client privilege is therefore inapplicable to the instant litigation.

COUNT III

In Count III, Plaintiff alleges that the Government in the Sunshine Act, 5 U.S.C. § 552b, requires that the Consultative Process be open to the public. The only issue in dispute is whether the CP meetings are "meetings" within the meaning of the SA. The Act defines meetings as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." 5 U.S.C. § 552b(a)(2). The FCC does not deny that agency business may be disposed of at CP meetings; in fact, it refused to preclude such an occurrence when it denied Plaintiff's Petition for Rulemaking. Nor can it deny that FCC business is "conducted" at CP meetings. The only issue, therefore, is whether the required number of agency members attend CP meetings.

It is uncontroverted that the CP meetings have been attended by three FCC Commissioners, and that the Commissioners are "members" within the meaning of SA. 5 U.S.C. § 552b(a)(3). Defendant contends, however, that 47 U.S.C. § 154(h) states that four members of the Commission are required to constitute a quorum for any FCC business. Section 154(h) is not dispositive, however. 47 U.S.C. § 155(b)(1) authorizes the Commission to delegate any of its functions to a subdivision of the Commission, and 47 U.S.C. § 155(b)(3) states that any action taken pursuant to such a delegation of authority has the same force and effect as an action of the full Commission. The issue, therefore, is whether the three Commissioners have been delegated the authority to act for the FCC pursuant to 47 U.S.C. § 155(b).

It is evident that the authority has been so delegated. The Senate Report of the SA states that "Panels or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency, are required

by the subsection to be open to the public..... The whole decision-making process, not merely its results, must be exposed to public scrutiny." S. Rep. No. 94-354, 94th Cong., 1st Sess. 17-18 (1975). Likewise, the House Report states that "[a] subdivision of an agency covered under Section 552b is covered if it is authorized to act on behalf of the agency. Panels ... of an agency are covered if authorized to act on behalf of an agency, even if their action is not final in nature. Thus, panels ... authorized to submit recommendations, preliminary decisions, or the like to the full commission ... are required to comply with the provisions of Section 552b." H. Rep. No. 94-880, 94th Cong., 2d Sess. 7 (1976). It is beyond dispute that the three Commissioners are authorized to submit recommendations to the full Commission. It cannot be contested that the CP is designed to effectuate the decision-making process, and that recommendations facilitating FCC policies may well result from CP meetings. Should Defendant wish to hold CP meetings behind closed doors, they must comply with 5 U.S.C. § 552b(d). They have not yet pursued this remedy, and are therefore in violation of the SA. An appropriate Order follows this Memorandum Opinion.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

ORDER
Filed Oct. 24, 1980

Upon consideration of Defendant's Motion for a Stay Pending Appeal, the Opposition thereto, the arguments heard this date, and the entire record herein, the Court notes that (1) this Court granted Plaintiff's Motion for Summary Judgment on Count II (under the Freedom of Information Act (FOIA)) and Count III (under the Government in the Sunshine Act (SA)) on October 17, 1980; (2) Defendant asserted in Count II that the documents sought met the requirements of Exemption 5, 5 U.S.C. § 552(b)(5), in that they were both predecisional and deliberative; (3) to date, Defendant has not indicated what "policy or process" was addressed in said documents, as is required by FOIA, *see Coastal State Gas Co.* v. *DOE*, 617 F.2d 854, 868 (D.C. Cir. 1980); (4) in Count III Defendant asserted that the SA did not apply to the Consultative Process (CP) because CP meetings are "held for the exclusive purpose of clarifying respective views and explaining the policies and actions of the pertinent bodies"; (5) Defendant has consistently refused to represent, either through formal rulemaking procedures or on the record of this case that no agency action will be effectuated at the CP meetings; (6) the facts of this case indicate that (a) three FCC Commissioners attend the CP meetings, (b) those three Commissioners are members of the Telecommunications Committee, and (c) those Commissioners have the authority to make recommendations and take certain agency action; (7) without a representation to the contrary, this Court must infer that agency action is likely

to be effectuated at the CP meetings; (8) those meetings are therefore subject to the requirements of the SA; (9) should Defendant believe that the applicability of the SA significantly frustrates agency action, it may, pursuant to 5 U.S.C. § 552b(c)(9)(B) and 5 U.S.C. § 552b(d) act to preclude public attendance at the CP meetings; (10) under the circumstances presented in the instant case the FCC has not yet had the opportunity to close the CP meetings; (11) it is in the interests of justice that Defendant be given the opportunity to meet the requirements of the Government in the Sunshine Act before it is Ordered to open the CP meetings to the public; (12) the standards for the granting of a stay are delineated in *WMATC* v. *Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) and *Virginia Petroleum Jobbers Assn.* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958); (13) Defendant has met the standards for a stay of this Court's disposition of Count II of the instant case because an Order of immediate disclosure would moot its appeal; (14) Defendant has not met the standards for a stay of this Court's disposition of Count III in the instant case because such a stay would irreparably harm Plaintiff; and (15) because Defendant has represented that the next CP meeting will be memorialized in transcript form, this Court will give Defendaant twenty-one (21) days to meet the requirements of the SA. It is therefore by the Court this 24th day of October, 1980,

ORDERED, that this Court's Order dated October 17, 1980, be and hereby is amended; and it is

FURTHER ORDERED, that the word "FORTHWITH" appearing in paragraph five (5) of said Order be and hereby is deleted; and it is

FURTHER ORDERED, that the words "on or before November 15, 1980" be placed in its stead; and it is

FURTHER ORDERED, that Defendant's Motion for a Stay of this Court's disposition of Count II be and hereby is GRANTED; and it is

FURTHER ORDERED, that Defendant's Motion for a Stay of this Court's disposition of Count III be and hereby is DENIED.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 80-229
27296

May 8, 1980
RM 3523

Petition of
ITT WORLD COMMUNICATIONS, INC.

For rulemaking concerning contacts between the FCC and foreign telecommunications administrations with respect to future international communication services and entry of new common carriers.

ORDER DENYING PETITION

Adopted: April 28, 1980 Released: May 2, 1980

By the Commission:

Introduction

1. On October 24, 1979, ITT World Communications, Inc. (ITT) filed a Petition for Rulemaking proposing that the Commission adopt new rules of practice and procedure to regulate its contacts with foreign administrations and telecommunications entities. The goal of these rules, according to ITT, would be to ensure that these contacts neither prejudice the rights of existing U.S. international service carriers, nor compromise the integrity of the Commission's processes. ITT believes that such rules are needed because the Commission, through its Telecommunications Committee, may be planning to continue to meet informally with foreign administrations to discuss future services and entry of new U.S. carriers in international markets.

2. The specific catalyst for the Petition is a conference held last fall in Dublin, Ireland, on October 2-3, attended by representatives of the Commission, the Department of State, the Conference Europeene des Administrations des Postes et des Telecommunications

(CPT) and Teleglobe Canada.[1] Apparently concerned that this conference portends further contacts somehow inimical to its own interests, ITT filed this Petition. ITT's argument, reduced to its essentials, is that the Commission lacks authority to engage in discussion with foreign governments and telecommunications entities, but, if it does so, it must have regulations governing all its contacts. We disagree, and we deny the Petition for the reasons discussed below.

Summary of Petition

3. After stating that the Commission in the first instance lacks the legal authority to negotiate with foreign governments on behalf of the United States, ITT requests that the Commission issue a policy statement to delineate clearly that the purpose of all meetings with foreign administrations is limited to the exchange of information of mutual interest. In addition, the proposed policy statement would disclaim any intent of the Commission to negotiate or to subject foreign administrations to its regulatory jurisdiction. ITT believes that such a policy statement would prevent any misinterpretation of Commission statements by foreign administrations. Specifically, ITT proposes that the statement make clear that the Commission attendees have no delegated authority to bind the entire Commission and that the Commission will refrain from discussing the merits of matters pending before it or from advancing the interests of one American carrier over another. ITT's concern in this regard is the possibility of Com-

[1] ITT filed a request under the Freedom of Information Act, FOIA 9-192, seeking access to documents concerning the Dublin conference and other contacts between the Commission and foreign governments and telecommunications entities. This request was partly granted and partly denied, FCC 80-78 (released February 20, 1980). ITT has also attacked these contacts collaterally by filing suit in federal court. ITT World Communications, Inc. v. FCC, No. 80-0428 (D.D.C., Filed February 12, 1980).

mission prejudgment of pending and future proceedings. Moreover, ITT requests that the Commission examine the issue of what topics should be discussed at these meetings, expressing concern that the selection of topics may appear to foreign administrations to be sponsoring certain services and carriers to the detriment of others. Furthermore, ITT submits that the selection of topics must be made with on-the-record input from the U.S. carriers to avoid raising serious antitrust questions. ITT explains that if the Commission intends, by its meetings with foreign entities, to foster competition, preliminary proceedings must determine that the services and carriers selected do not subvert the legitimate forces of marketplace competition.

4. In addition to a clarifying policy, ITT wants the Commission to implement comprehensive notice and comment procedures to be followed prior to Commission attendance at these meetings. According to ITT, these measures would ensure that all meetings of this type proceed in a manner consistent with the procedural and substantive rights of all interested parties. Towards this end, ITT proposes that the meetings be open, held on the record with transcripts made available to the public, and with the opportunity for any interested party to present its views, orally, or in writing, at the meeting. In the event of its exclusion, any interested party should be notified in advance of the Commission's rationale for its exclusion with the opportunity to show why such action is erroneous. Moreover, the regulation should require 30 days' advance public notice of all such meetings and the subjects to be discussed; interested carriers could then respond to the propriety of the proposed topics, could inform the Commission of their positions, and could propose additional subjects for discussion. ITT would further require the Commission to indicate its disposition of all comments received, including subjects added or deleted.

5. ITT maintains that the proposed rules and procedures comport with the spirit and the letter of the *Government in the Sunshine Act*, 5 U.S.C. Section 552b.

While allowing that the applicability of the *Sunshine Act* is unclear until the nature of these meetings is determined, ITT submits that any discussion beyond the mere exchange of information falls under the letter of the Act as well as Sections 0.601 through 0.607 of the Commission's Regulations, 47 C.F.R. Sections 0.601-0.607, requiring open meetings except in narrowly-limited circumstances. In any event, ITT believes that the spirit of the *Sunshine Act* applies even to exchange-of-information meetings.

6. In framing a legal foundation for the proposed rule requiring advance notice to any excluded party, ITT cites the *Administrative Procedure Act (APA)*, 5 U.S.C. Sections 553, 557, entitling a party to know the grounds for an administrative determination which is adverse to his interest, and a similar provision of the *Sunshine Act*, 5 U.S.C. Section 552b(f)(1), requiring the Commission to certify publicly its reason for holding a closed meeting. (See also 47 C.F.R. Section 0.605(c)(2) and (d)(2). In addition, ITT cites the Commission's *ex parte* rules, 47 C.F.R. Sections 1.1201-1.1251, as requiring a record of all information obtained from foreign administrations used as the basis for any future administrative decisions. Without a record with a full transcript available to the public, ITT foresees difficulty in assuring that interested parties will have an adequate opportunity to rebut or challenge the information provided by the foreign administrations.

Summary of Responses

7. Comments were filed by RCA Global Communications (RCA), Satellite Business Systems (SBS), Southern Pacific Communications Company (SPCC), GTE Telenet Communications Corporation (Telenet) and Graphnet; reply comments were submitted by ITT, RCA, Graphnet and Western Union International (WUI). For the most part, comments follow along predictable lines with the aspiring newcomers to the field (SPCC, Telenet and Graphnet) viewing the relief re-

quested as an obstacle to their establishing direct overseas services and the incumbents (RCA and WUI) more or less supporting the Petition.[2]

8. In supporting the Petition, RCA argues that the Commission may exchange views with foreign administrations only within the context of a docketed rulemaking proceeding where the Commission's *ex parte* rules and the strictures of the *APA* would require notice, open recorded meetings and open comment. Like ITT, RCA believes that these requirements would protect the rights of interested parties, disclose the bases of Commission decisions, avoid any prejudice to pending matters and ensure that the Commission does not usurp the diplomatic role assigned to other federal entities. Submitting that private informal exchanges outside of a Commission proceeding are illegal in the first instance under Section 553 of the *APA*, RCA further adds that Commission involvement in such areas previously left to free enterprise runs directly counter to current deregulation policies.

9. The opponents agree that ITT's proposed rules are a protectionist measure, that is, an attempt to further the interests of ITT and to inhibit the Commission's ability to promote a policy of greater competition in overseas communications. Graphnet specifically raises the Commission's right and duty to discuss Commission objectives to secure overseas cooperation in "worldwide service," citing Sections 1, 2, 303(g), and 4(i) of the Communications Act of 1934. SBS recounts the inability of Telenet to obtain a formal operating agreement with the British administration to illustrate its belief that the adoption of ITT's proposal would thwart its own ability to furnish direct services.

10. Although conceding the Commission's inability to negotiate directly with the foreign administrations, the opponents emphasize the need for permitting the Commission wide latitude in the scope of these discussions

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[2] WUI's pleading merely supports ITT's concept without addressing the arguments.

without the proposed procedural constraints. In support, SBS notes the Commission's role as the principal U.S. agency responsible for implementing U.S. telecommunications policy and the entity most familiar with the carriers it regulates. SPCC agrees with this notion, emphasizing that, in order for foreign administrations to get an objective view of the Commission's pro-competition policy, the view should be presented by a neutral Commission rather than interested private parties. Telenet adds that the Commission must be free to learn first-hand the views of foreign entities to develop an independent expertise and understanding. It asserts that the international record carriers (IRC's), having a vested interest in this subject matter, cannot be expected to function as unbiased intermediaries.

11. SPCC contends that there is no evidence that any meetings between the Commission and foreign entities developed into negotiations or that foreign administrations misconstrued the expressed intent of the Commission to avoid negotiating sessions. In a similar vein, Telenet states that the factual predicate upon which ITT bases its petition is unclear, pointing to ITT's concession that the Commission has been careful only to consult and to exchange information rather than to negotiate. SPCC also notes the absence of any showing that the Commission contacts with foreign administrations resulted in or will result in prejudgment of particular applications for authorization to provide service; were such a showing made, the issue may be taken to the Commission or the courts. In addressing this point, Telenet and Graphnet agree that informing foreign administrations of U.S. policy does not involve prejudgment but only a request for foreign recognition of Commission policy. Graphnet adds that ITT has not alleged any injury resulting from past discussions nor expected injuries from future discussions encouraging new entry.

12. With respect to the proposed procedures, Graphnet maintains that they are not necessary to protect the procedural rights of the IRC's and would be likely to stifle a spontaneous flow of information between the

Commission and foreign entities. Moreover, Graphnet points to the severe burden that would be imposed on the Commission staff with respect to handling the notice, comment and formal agendas prior to meetings. Regarding ITT's suggestion that the Commission predetermine the topics to be discussed at these meetings, SPCC submits that such selective discussion would itself effectively prejudge pending decisions before the Commission and carry with it significant antitrust problems. SPCC is the only opponent who specifically agrees with certain of ITT's suggested procedures, to wit: that there should be public notice of proposed meetings; that all meetings should be made public; that interested parties should be told in advance if they are to be excluded from the meetings; and that records should be kept of the meetings. SPCC does not agree, however, that there must be an opportunity for interested carriers to comment on the agenda, believing that such collaboration between the Commission and private firms would have antitrust ramifications. Furthermore, SPCC maintains that parties have other opportunities to comment on any proposed Commission action based on these discussions through normal Commission processes.

13. Finally, several of the carriers address the question of whether ITT's proposed rules are required by law. RCA contends that these measures are already applicable to Commission discussions and meetings with foreign administrations through existing statutes and rules. Telenet, on the other hand, categorically states that ITT's proposed rules are *not* required by law. It argues that, since foreign telecommunications entities are not subject to the jurisdiction of the FCC, their informal meetings with Commission members and staff cannot be subjected to *APA* and *Sunshine Act* requirements. Graphnet, too, submits that the Commission can gather information and discuss policy directions without engaging in improper *ex parte* contacts that taint upcoming proceedings. In this regard, Graphnet maintains that the *APA* only requires that a summary of the

information forming the basis for decisions be disclosed in time for contrasting views to be considered.

14. The reply comments generally do not reveal any new facts or arguments relevant to our decision. RCA, for example, attacks the notion that there can be wide latitude in agency contacts with foreign entities as inconsistent with legal restraints on Commission action. ITT reiterates its position that negotiations will take place and that the *APA* applies to these contacts. In the only new matter presented, Graphnet relies in rebuttal on the recent decision by the Court of Appeals in the case involving the disqualification of FTC Chairman Pertschuk from a rulemaking proceeding.[3]

Discussion

15. Our primary objective in dealing with the subject of international communications is, has been, and will continue to be an open and impartial regulatory regime that is responsive to both the public and the regulated companies. Because the Petition and the collateral suit in federal court may have raised questions, however unsupported, about our processes, we will undertake a point-by-point response. As we see it, there are four issues raised in the Petition: (1) whether the Commission has engaged in "negotiations"; (2) whether the Commission has statutory power to make *any* contacts with foreign governments or telecommunications entities; (3) whether the *Government in the Sunshine Act* is applicable; and (4) whether there are *ex parte* and other due process questions involved here. In the following discussion, we conclude: (1) that the Commission has not "negotiated" with foreign entities; (2) that contacts with foreign administrations are not only permissible but are encouraged by the Communications Act; (3) that the *Sunshine Act* does not apply to contacts of this type; and (4) that the *APA's* and our own *ex parte* rules are

[3] Association of National Advertisers, Inc. v. FTC, No. 79-1117 (D.C. Cir., Dec. 27, 1979).

usually inapplicable to the discussions in question but are observed scrupulously when they do apply.

16. Although acknowledging that "the Commission has exercised care in consulting rather than negotiating with foreign administrations" (Petition at 4), ITT nevertheless argues that, because the Commission does not have specific authority to negotiate with foreign governments on behalf of the United States, Commission members and staff may not meet informally with their foreign counterparts to discuss telecommunications policies and goals. As a preliminary matter, ITT's position is at odds with its concession (Petition at 6) that "the Commission has an affirmative responsibility to cooperate with foreign telecommunications entities toward achievement of" the goal of "foster[ing] a rapid and efficient worldwide telecommunications system".

17. Not surprisingly, ITT's petition provides little of the background of the Commission's participation in the foreign discussions the carrier has suddenly determined to oppose. For almost six years now, the Commission and other U.S. agencies, including the State Department, have engaged in a series of informal conferences with Canadian and European telecommunications entities to discuss facilities planning. These conferences, known as the Consultative Process, reflect the mutual desire of all participants to improve, through the exchange of information and views, the usage planning of jointly-owned telecommunications facilities in the North Atlantic Region. A detailed history of the Consultative Process is set forth in *Policies for Overseas Common Carrier Facilities*, 73 FCC 2d 193 (1979). ITT and the other international record carriers have actively participated in and supported the Consultative Process over the years. ITT's about-face with respect to the Dublin conference, which was a facilities planning consultation, stems from the fact that during the conference there was a separate, preliminary discussion among the participants concerning the Commission's desire to initiate similar consultations on such important non-facilities topics as new services and new carriers. Out of appar-

ent concern that such additional consultations could ultimately lead to greater competition in the provision of international communications services, ITT has filed a petition which in effect challenges the Commission's authority to engage in any form of foreign consultative discourse.

18. The Consultative Process, even where limited to a facilities planning format, provides a valuable if not indispensable source of information, not just because it facilitates our predictive judgment as to future foreign communications needs and the solutions to those needs that will be acceptable to other countries, but also because foreign entities can participate without being subjected "to U.S. regulatory jurisdiction in fact or appearance". *A.T.&T. Co.*, 73 FCC 2d 248, 254 (1979). The process also frees us from near total dependence on our regulatees in gauging foreign telecommunications problems and needs. These considerations apply with at least equal force to any expanded consusltations along the lines discussed at Dublin. These expanded contacts are still in a formative, tentative stage, and we do not presently know whether they will become a permanent part of the Consultative Process per se, or a separate process altogether. We intend to pursue the matter, however, unless experience shows that it should be abandoned as unworkable. Like the on-going facilities planning process, consultations to explain and promote our statutory mandate are, as shown below, well within our authority and do not, contrary to ITT's position, take us into the area of formal international negotiation.

19. Negotiation between sovereign states in general connotes a formal diplomatic process for the development and formulation of various kinds of binding executive agreements and treaties. The participants in such negotiations ordinarily have authority to speak for their respective countries and to commit them, subject frequently to a subsequent formal ratification by the individual sovereigns, to the terms of any agreement that may be established. This level of diplomatic process ob-

viously bears little similarity to the type of informal discussion the Commission's Telecommunications Committee engages in.[4] In the first place, even if the purpose of the Commission's contacts was to reach some form of formal telecommunications agreement, the participating Commissioners would lack the authority to bind the Commission, much less the United States, to any such agreement.[5] Moreover, the limited scope of authority of the Committee has always been, and will continue to be, fully explained in advance of these talks, and we have no basis for concluding that any foreign participant has ever misunderstood the limits of the Committee's authority. In fact, ITT contradicts its own position by citing a letter from a foreign participant in these talks which plainly demonstrates the author's understanding that "the Commission cannot engage in discussions which might be construed as negotiation of differences * * *" (Petition at 4, n.1).

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[4] The Commission fully recognizes that international negotiation is the province of the State Department. See 22 U.S.C. 2656. Moreover, any implication that the Commission's informal consultations conflict with executive prerogative overlooks the Department's active participation in the conferences, starting with the first such session in Munich, Germany in 1974. In its collateral court suit (though not in its petition), ITT suggests that the Commission's foreign contacts are somehow inconsistent with the Logan Act (18 U.S.C. 953), a statute which prohibits U.S. citizens from engaging in *unauthorized* private correspondence or intercourse designed to influence "the measures or conduct of any foreign government * * * in relation to any disputes or controversies of the United States". In the unlikely event that this provision applies to the Commission, we believe our statutory authority to regulate foreign communications services amply satisfies its requirement that any such contacts be authorized by the U.S. Government. We cannot resist observing, however, that ITT is silent on the Logan Act's applicability to ITT's numerous contacts with foreign governments to negotiate private operating agreements.

[5] As discussed in more detail below, the authority of the Commission's Telecommunications Committee is narrowly circumscribed. *See* 47 C.F.R. Section 0.215. In the absence of a specific delegation; the Committee can not bind the whole Commission.

20. To the extent that the Commission needs specific authority to engage in the informal consultations ITT challenges, we think the Act clearly permits—in fact encourages—such contacts. To begin with, the purpose of the Act, in part, is the "* * * [regulation] of interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" (Section 1, 47 U.S.C. 151). In furtherance of that purpose, the Commission, among other powers, is authorized to license common carriers subject to the Act to provide foreign communication services (Section 214, 47 U.S.C. 214.).[6] The Commission does not, however, possess the authority to compel the acceptance by foreign governments of telecommunications services that we have found to be required by the public convenience and necessity. Thus, in an attempt to avoid frustration by foreign governments of our mandate to make available to U.S. consumers a "world-wide wire and radio communications service", we have undertaken to have Commission representatives meet face to face with them to discuss mutual present and future telecommunications needs and the policies which will best serve them.[7] Many countries do not share our view that reliance on competition will ultimately provide the most efficient services at the lowest cost to consumers. Informal talks allow us the opportunity to improve foreign understanding of the bases for and the nature of our

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[6] The Commission's involvement in foreign communications permeates both the Communications Act of 1934 (*see, e.g.*, sections 301, 303(n) and (r), 47 U.S.C. 301, 303 (n) and (r)) and the Communications Satellite Act of 1962 (*see, e.g.*, section 201 (c), 47 U.S.C. 721(c)). The Commission is empowered to * * * perform any and all acts * * * as may be necessary in the execution of its functions" (section 4(i), 47 U.S.C. 154(i).

[7] Ordinarily, these discussions would be attended by one or more of the three Commissioners who comprise the Telecommunications Committee.

pro-competition policies and, at the same time, to increase our knowledge of any unique telecommunications problems or policies which may exist in a particular country. We believe these consultations can assist in the development within the U.S. regulatory process and within foreign decision-making fora of telecommunications policies which are independently arrived at but which reflect a greater awareness of each other's vital telecommunications concerns. This process is not a process of negotiation since it recognizes that each participant must independently adopt positions in accordance with the procedural and substantive requirements of its own legal system. Nevertheless, the process may result in a cooperative telecommunications climate between the countries involved which should significantly enhance the prospect for foreign acceptance of previously authorized services and services that may be licensed in the future.[8] To the extent that these informal discussions can advance our progress toward realization of statutory goals, they are a necessary and natural corollary of our international licensing authority.

21. ITT next contends that, even if Commision members may lawfully participate in the discussions at issue, they may do so only in open meetings under the *Government in the Sunshine Act*, 5 U.S.C. 552b, and only after adoption of rules such as ITT here proposes. At the heart of ITT's contention is the belief that existing procedures and rules do not provide adequate safeguards against claims of prejudgment that could result from the foreign contacts.[9] We see no need to supplement the existing laws that ITT finds inadequate.

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[8] The comments supporting the Petition suggest that these informal talks impermissibly involve the Commission in foreign policy matters. The Commission *is* involved in international communications policy matters. That involvement, however, derives not from these consultations, but principally from our statutory authority to license foreign communications services.

[9] ITT's proposed rules would apply only to foreign contacts. It apparently believes that existing laws and rules provide adequate protection against prejudgment in other contexts.

22. As a preliminary matter, we do not agree that the *Sunshine Act* applies to the informal consultations ITT opposes. By its terms, Section 552b(b) specifies that "* * * every portion of every meeting of an agency shall be open to public observation." The term "meeting", however, is defined in Section 552b(a)(2) as "* * * the deliberations of a least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business * * *". Normally, the Commission may take action only when at least four of the seven members, or a quorum, are present. *See* Section 4(h) of the Act, 47 U.S.C. 154(h). Since only three members sit on the Telecommunications Committee, they could not act on behalf of the Commission in the course of any consultations, even if all three of the committee members attended, unless specifically delegated the authority to do so under Section 5(d)(1), 47 U.S.C. 155(d)(1)[10] If four or more Commissioners attended a foreign consultation, the initial question, for purposes of determining the applicability of the *Sunshine Act*, would be whether the Commissioners engaged in deliberations which determined or resulted in the joint conduct or disposition of official agency business. Thus, the *Sunshine Act* does not require public observation of the Committee's discussions with foreign representatives. In fact, ITT's Petition cites no law or rule which would prohibit one, two, or even three Commissioners from conferring in private with anyone, foreign or otherwise, to discuss any matter not pending before the Commission. The notice and comment features of the *APA* and the open-meeting provisions of the *Sunshine Act* were not intended to govern every outside contact agency members and staff might have. These informal consul-

[10] The Telecommunications Committee's authority to act on behalf of the Commission is presently limited to action on certain common carrier applications and requests. *See* 47 C.F.R. 0.215. The Committee's meetings with respect to such matters are, of course, subject to the Sunshine Act.

tations are not a forum for agency decision making, and they do not involve a deliberative process for the disposition of any of the Commission's official business. To the extent that any information obtained in these consultations subsequently beomes relevant to a Commission proceeding, it will be fully disclosed and fully subject to *APA* decision making procedures.

23. The Commission nevertheless recognizes and supports the desirability of conducting its activities, both formal and informal, within public view, and we entertain no general intention of departing from that preference with respect to the discussions at issue here. At the same time, however, we can not ignore the fact that some foreign administrations may not share this policy. It is likely, therefore, that, notwithstanding our desire for public discussions, on some occasions a choice will have to be made for a closed session rather than foregoing the benefits of a contact we believe we have an affirmative obligation to pursue. We think the Commissioners who attend these discussions are entitled to make such a choice based on all the circumstances. We will, as a matter of discretion, however, follow certain notice and reporting steps with respect to contacts with foreign administrations. See paras. 27, 28, *infra*.

24. Most of ITT's remaining arguments are in reality addressed to the advisability, rather than the legality, of informal discussions with foreign administrations. ITT sees such discussions as fraught with the potential for prejudgment of pending and future cases and for *ex parte* influences.

25. First, ITT apparently would find prejudgment in any Commission efforts intended to assure the effectuation of foreign interconnection rights for carriers we have previously licensed to provide foreign communications services. Such a position is without merit. Promoting the implementation of our public convenience and necessity determinations is plainly within our authority. Indeed, any assertion that the Commission lacks the authority to implement its regulatory determinations would effectively vitiate the Commission's

mandate under Section 1 of the Communications Act to regulate foreign communications services. Moreover, we perceive no legitimate public interest basis for objection to such efforts by incumbent international record carriers.

26. Second, we believe ITT's contentions are speculative, for in the absence of a pending proceeding, be it formal or informal, questions of prejudgment or *ex parte* contact simply do not arise.[11] In any event, ITT has not explained why existing laws will not adequately protect its rights if it believes that a Commissioner has made a statement suggesting prejudgment of a particular pending matter, or receives or makes an *ex parte* communication with respect to one. The mere fact that prejudicial statements, or *ex parte* communications, could be made during the course of a closed consultation does not support the conclusion that Commission members may not participate in such consultations. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977) ("[I]nformal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness. * * * * Of course, if the information contained in such a communication forms the basis for agency action, then ... that information must be disclosed to the public in some form"). Even where the *Sunshine Act* applies, there are exceptions to the open meeting requirement. In either case, a party seeking to establish prejudice in a subsequent or pending proceeding faces the same problems of proof. Moreover, the theoretical possibility that improper conduct will occur

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[11] The case on which ITT principally relies in this connection, Cinderella Career and Finishing School, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970), was recently distinguished in Association of National Advertisers, Inc. v. FTC, ____ F.2d ____ (D.C. Cir. No. 79-1117, decided December 27, 1979). The latter case is particularly instructive here for its discussion of the wide latitude agency members have to air their views even though they may relate to matters embraced by a pending proceeding.

does not vitiate the presumption to which the Commission is entitled, here as elsewhere, that agency officials will judge a particular controversy on its own merits.[12] We see no greater risk of the problems ITT envisions in these consultations than is present in every other contact the Commission or its members and staff may have with the public.

27. To avoid any misunderstanding, however, we will state the procedures that we intend to continue to follow when the Telecommunications Committee meets with foreign entities. These procedures are flexible, and we expressly reserve the right to depart from them where necessary to accommodate any special circumstances which may arise with respect to a specific conference.

28. As in the past, whenever a conference is scheduled, we will give notice in advance indicating the time and place, the persons expected to attend, and the general topics to be discussed. Interested persons will have an opportunity to submit written comments suggesting additional topics, specific problems to be raised, and anything else germane. We will try to schedule an oral briefing before the session, which would be open to anyone. The conferences themselves will generally be open to observers unless it is determined that circumstances exist which warrant closure. Following each conference at which topics of widespread interest are discussed, we will conduct a public debriefing. In sum, we intend to apply the procedural safeguards which are appropriate for the specific subject matter discussed at each conference.[13]

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[12] *See* Central Ark. Action Sale, Inc. v. Bergland, 570 F.2d 724, 731 (8th Cir. 1978).

[13] For example, if discussions do touch on matters at issue in pending proceedings, we will apply any applicable *ex parte* rules. *See* 47 C.F.R. 1.1201 *et seq.;* Interim Policy Statement on Ex Parte Communications in Informal Rulemaking Proceedings, 68 F.C.C. 2d 804 (1978). (We will soon be rexamining our *ex parte* procedures for informal rulemaking and, in that connection, will deal with the applicability of those procedures to the international consultative process.)

29. Our procedures comply fully with both the letter and the spirit of all relevant laws and principles of due process, and they have worked efficiently and fairly. Changing them along the lines advocated by ITT and RCA would not further the *public* interest, which is our paramount concern.

30. ACCORDINGLY, IT IS ORDERED that the Petition of ITT World Communications, Inc. for rulemaking, RM 3523, is denied.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary